Regulating Executive Power under the Australian Commonwealth Framework

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Preface

This book is about an aspect of government at the Commonwealth level in Australia. The intention of the book is to capture some of the significant developments in the public administration reforms that started in the 1970s and worked their way through to the Parliament in the 1990s. They have since become the foundation frameworks for public administration. The key legislative measures are addressed in the *Financial Management and Accountability Act 1997* (Cth), *Commonwealth Authorities and Companies Act 1997* (Cth), *Auditor-General Act 1997* (Cth), *Charter of Budget Honesty Act 1998* (Cth) and the *Public Service Act 1999* (Cth). The consequence has been significant changes to the Budget, the financial (appropriation and spending) arrangements, the governance structures and the employment arrangements. The result is that, in many respects, the Commonwealth government is now a lot more accountable, responsible and transparent than at any time in history. Yet many of these reforms have been overlooked in the broader debates about constitutional law and administrative law and the assessments of governmentality. They are also strangely absent from the renewed discussions about revitalising government through administrative law reforms and the new integrity measures. Hopefully this book provides an overview of these public administration developments that have re-invigorated open government, making it more efficient, more effective, more ethical, and most importantly, exposing many of the formerly hidden activities of government.

The central theme of the book is an exposition of executive power and tracing the flow of money recognising the pivotal role of money in almost every decision and activity of government, and the imprint of decisions about money that echo through almost every aspect of accountability, responsibility and transparency. Is there money? Is there power to spend? Why does it need to be spent? Who is making the decision to spend? Who is doing the spending? Was it a good (efficient and effective) decision to spend? Was there 'value for money' from spending? How much money is left after spending? What can be learned from that experience of spending? While each of these questions is not directly answered by the public administration reforms, those legislative reforms do make it possible to ask those questions. In many instances this data and information can be compiled across the readily available reports and other publications, and it is certainly open for this data and information to be compiled and made available to Parliament. Perhaps the fundamental public administration reform has been the 'clear read' between the money allocations in the Budget through spending and to reporting back on spending in the *Annual Reports*. Whether Parliament is up to the task of adequately reviewing the available data and information, however, is another open question. Perhaps this is the genesis of another book?

This book does not attempt to provide a comprehensive account of executive power – that task is impossible as the outer bounds of executive power are unknown and almost certainly unknowable. Instead the High Court's decisions affecting and sometime precipitating or condoning the public administration reforms are examined in detail together with the legislative measures introduced in the 1990s legislative reforms. While for casual readers this might appear excessive, it is necessary to reveal the contours of the basis for reform and the potential avenues available for future reforms. It is a mistake to see any of the High Court's decisions as determinative and final on any issues about the scope and exercise of executive power. Importantly, the legal advice available to government is geared towards allowing what is possible within the various possible interpretations. These advices are then crafted and framed to suit the needs and wants of evolving and expanding government. This means that the legal advisers are looking for permissive interpretations that change over time, seeking merely credible answers. This might favour one judge's perspective, or take advantage of a particular frame among confused interpretations. This can and does lead to some astounding reforms those previous generations might have considered impossible (and perhaps even reprehensible). Perhaps the most far reaching of these 'impossible' reforms have been the evolving interpretations of the *Constitution*'s finance provisions. They have been (re)interpreted to accommodate accrual accounting *and* a shift to after-the-event reporting in place of detailed before-

the-event appropriations – a reform that probably has still to register its significance. In short, you never know which interpretation will shine, and so every twist and turn is potentially relevant and, most significantly, in the end the detail really does matter.

The book's genesis has been as a resource for the 5172LAW *Executive of Government* course at Griffith University. Hopefully, however, the book will also be a catalyst for more study of the evolving public administration reforms and a resource for those wanting to understand the fundamental frameworks enabling a more accountable, responsible and transparent government. Perhaps it will also inspire a more nuanced scrutiny of government taking advantage of the plethora of available governmental performance data and information, especially by those in Parliament with the authority and position to request the data and information and ask the probing and detailed questions.

Finally the thank you to all those who have assisted, encouraged and supported this venture: Marc Mowbray-d'Arbela, Gary Williamson, Catherine Pickering, Kieran Tranter, and Black Jettie.

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Abbreviations

AAS	Australian Accounting Standards
AASB	Australian Accounting Standards Board
ABS	Australian Bureau of Statistics
APS	Australian Public Service
AWAs	Australian Workplace Agreements
CAC bodies	*Commonwealth Authorities and Companies Act 1997* (Cth) bodies
Ch	Chapter
COAG	Council of Australian Governments
CRF	Consolidated Revenue Fund
Cth	Commonwealth
DPP	Commonwealth Director of Public Prosecutions
Eng	England
FMA Act	*Financial Management and Accountability Act 1997* (Cth)
GATT	General Agreement on Tariffs and Trade
GBE	Government Business Enterprise
GFS	Government Finance Statistics
GGS	General Government Sector
GST	Goods and Services Tax
ILO	International Labour Organisation
Imp	Imperial
in liq	in liquidation
JCPAA	Joint Committee of Public Accounts and Audit
JSCOT	Joint Standing (Parliamentary) Committee on Treaties
NSW	New South Wales
PBS	Portfolio Budget Statements
PFCs	Public financial corporations
PNFCs	Public non-financial corporations
PRIMA	Primary Reporting and Information Management Aid
Qld	Queensland
SA	South Australia
SES	Senior Executive Service
SMAs	Statutory Marketing Authorities
SMEs	Small to medium enterprises
SPPs	Specific Purpose Payments
Tas	Tasmania
TRIPS	*Agreement on Trade-Related Aspects of Intellectual Property Rights*
UK	United Kingdom
UPF	Accrual Uniform Presentation Framework
Vic	Victoria
WA	Western Australia
WTO	World Trade Organisation

1. Introduction

Humans together almost always develop practices and rules, and these inevitably lead to 'government' in some form. Within that 'government', however, there is the requirement for a special kind of 'authority': '[t]he authority must be continuous, and not occasional; it must be capable of prompt and immediate action; it must possess knowledge and keep its secrets; it must know discipline'.[1] This book is about that 'authority' of 'government' as it is practiced in Australia – the part that carries on the business of government exercising executive power at the Commonwealth level.[2] At its most generalised, Commonwealth executive power is the legal authority conferring responsibilities, duties, rights and conventions ultimately founded in constitutional law, and exercised by the institutions of the Executive, in carrying on the business of government and delivering the benefits, goods and services of government at the Commonwealth level – executive power imbues every act and every action of government.

This book traverses the recent evolution of the executive power of the Commonwealth, tracing key institutions and personalities through their legal frameworks. The book, however, differs from traditional aspects of constitutional law and administrative law by focussing on the principles and procedures by which executive power is exercised. This goes beyond the court focussed meanings of the *Constitution*'s provisions, judicial review of administrative actions,[3] merits review of administrative decisions,[4] and the various Executive controlled accountability and transparency arrangements[5] (including the evolving 'integrity' arrangements).[6] The intention of this book is to address the 'other administrative law', where the means of accountability, responsibility and transparency are centred on the Parliament and the legislation made by the Parliament for those review and audit purposes.[7] The central theme of the book relies on the pivotal role that money plays in almost every decision and activity of government, and the legislative framework that surround the allocation, spending and accounting for money. While the evolution and development of the 'new' administrative law[8] undoubtedly followed from the perceived inadequacies in the Parliament's supervisory role,[9] this 'other' administrative law has evolved considerably in the last decade into a sophisticated framework of legal principles and procedures. The genesis of this 'other' administrative law was the remarkable economic liberalization in Australia starting in the 1980s addressing financial liberalization, fiscal discipline, macroeconomic stability, microeconomic reform, trade liberalization, privatization and liberalization of the labour market.[10] Its earliest incarnations of reform, however, were in the 1970s

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[1] W Harrison Moore, *Constitution of the Commonwealth of Australia* (2nd ed, 1910) p 292.

[2] The 'Commonwealth of Australia' was proclaimed by Queen Victoria, as the heir and successor in the sovereignty of the United Kingdom of Great Britain and Northern Ireland, on 17 September 1900 to commence on 1 January 1901: *Commonwealth of Australia Constitution Act* (UK) s 3.

[3] These include the inherent jurisdictions of Federal courts, such as the High Court under the *Constitution* s 75, and other statutory schemes, such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and the common law.

[4] These include the general schemes such as the *Administrative Appeals Tribunal Act 1975* (Cth), and the internal review arrangements under the various statutory schemes.

[5] These include freedom of information (*Freedom of Information Act 1982* (Cth)), privacy (*Privacy Act 1988* (Cth)), ombudsman review (*Ombudsman Act 1976* (Cth)), human rights (*Australian Human Rights Commission Act 1986* (Cth)), crime prevention (*National Crime Authority Act 1984* (Cth)), discrimination (such as the *Sex Discrimination Act 1984* (Cth), and so on.

[6] These include crime and misconduct commissions, 'whistleblower' protections, aspects of the ombudsman's work, and so on.

[7] This is consistent with the broad constitutional mandate to make laws dealing with the receipt and expenditure of revenue and money and the review and audit this receipt and expenditure: *Constitution* ss 51(xxxvi) and 97.

[8] Culminating as a generalisation in the enactment of the 'core' administrative law reforms: *Administrative Appeals Tribunal Act 1975* (Cth), *Ombudsman Act 1976* (Cth), *Administrative Decisions (Judicial Review) Act 1977* (Cth), *Freedom of Information Act 1982* (Cth), and *Privacy Act 1988* (Cth).

[9] See Gerard Brennan, 'The Parliament, the Executive and the Courts: Roles and Immunities' (1997) 9 *Bond Law Review* 136; Anthony Mason, 'Developments in Australian Administrative Law' (1998) 28 *Hong Kong Law Journal* 379.

[10] For an overview in the context of government see Jón Blöndal, Daniel Bergvall, Ian Hawkesworth and Rex Deighton-Smith, 'Budgeting in Australia' (2008) 8 *OECD Journal on Budgeting* 133 at 134-139 and the references therein.

and early 1980s with the reviews of how governmental elements might be structured and function.[11] These early developments culminated in the 1984 Financial Management Improvement Programme (FMIP)[12] and then a cascade of inquiries over the next decade leading to Parliament passing the *Financial Management and Accountability Act 1997* (Cth), *Commonwealth Authorities and Companies Act 1997* (Cth), *Auditor-General Act 1997* (Cth), *Charter of Budget Honesty Act 1998* (Cth) and the *Public Service Act 1999* (Cth).[13]

These public administration reforms of the 1980s and 1990s (and now the 2000s)[14] have substantially reshaped the executive government shifting it from being the owner and provider of goods and services to a standard setter, regulator and purchaser of goods and services.[15] In practice this has been achieved through a change from centralised 'command and control' to devolved responsibility and outsourcing, and a focus on achieving particular objectives (performance) and reporting on that performance (accountability and responsibility).[16] In particular, the public administration reforms adopted new means of allocating resources (through accrual budgeting) and then devolving responsibility for using those resources to those making decisions about how those resources (both the financial and employed (human) resources) should be managed and used (through accrual accounting and performance benchmarking). These reforms also imposed a plethora of reporting back arrangements so that the allocation and performance could be assessed and hopefully improved.

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[11] See Australian Public Service Board, *Financial Management Improvement Program: A Diagnostic Study* (1984); J Reid, *Review of Commonwealth Administration* (1983); H Coombs, *Report of the Royal Commission on Australian Government Administration* (1976). See also James Cutt, 'Accountability, Efficiency and the Royal Commission on Australian Government Administration' (1977) 36 *Australian Journal of Public Administration* 333.

[12] See Standing Committee on Finance and Public Administration, House of Representatives, *Not Dollars Alone: A Review of the Financial Management Improvement Program* (1990).

[13] See Joint Committee on Public Accounts, *Advisory Report on the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997*, Report No 353 (1997); Joint Committee on Public Accounts, *Charter of Budget Honesty Bill 1996: Advisory Report*, Report No 351 (1997); Joint Committee on Public Accounts, *Guarding the Independence of the Auditor-General*, Report No 346 (1996); Joint Committee on Public Accounts, *Financial Reporting for the Commonwealth: Towards a Greater Transparency and Accountability*, Report No 341 (1995); Joint Committee on Public Accounts, *Cash Matters: Cash Management in the Commonwealth*, Report No 340 (1995); Joint Committee on Public Accounts, *Accrual Accounting: A Cultural Change*, Report No 338 (1995); Joint Committee on Public Accounts, *Public Business in the Public Interest: An Inquiry into Commercialisation in the Commonwealth Public Sector*, Report No 336 (1995); Joint Committee on Public Accounts, *An Advisory Report on the Financial Management and Accountability Bill 1994, the Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994, and on a Proposal to Establish an Audit Committee of Parliament*, Report No 331 (1994); Joint Committee on Public Accounts, *Managing People in the Australian Public Service: Dilemmas for Devolution and Diversity*, Report No 323 (1992); Joint Committee on Public Accounts, *Review of the Independent Auditor: Watching the Watchdog*, Report No 319 (1992); Auditor-General, *Accountability, Independence and Objectivity: A Response to Report 296 of the Parliamentary Joint Committee of Public Accounts* (1989); Joint Committee of Public Accounts, *The Auditor-General: Ally of the People and Parliament*, Report No 296 (1989); Joint Committee of Public Accounts, *The Form and Standard of Financial Statements of Commonwealth Undertakings: A Discussion Paper*, Report No 199 (1982).

[14] See Advisory Group on Reform of Australian Government Administration, *Ahead of the Game: Blueprint for the Reform of Australian Government Administration* (2010); Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No 2 (2005); John Uhrig, *Review of Corporate Governance of Statutory Authorities and Office Holders* (2003).

[15] Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) p 161. There is an extensive literature about these developments and a considerable and ongoing debate about the merits of these developments: see, for recent examples, Warwick Funnell, Robert Jupe and Jane Andrew, *In Government We Trust: Market Failure and the Delusions of Privatisation* (2009) (privatisation failures in Australia, New Zealand, United Kingdom and the United States); John Halligan and Jules Wills, *The Centrelink Experiment: Innovation in Service Delivery* (2008) (delivering social welfare); Richard Hindmarsh, *Edging Towards BioUtopia – A New Politics of Reordering Life and the Democratic Challenge* (2008) (regulation of genetically modified organisms); and so on.

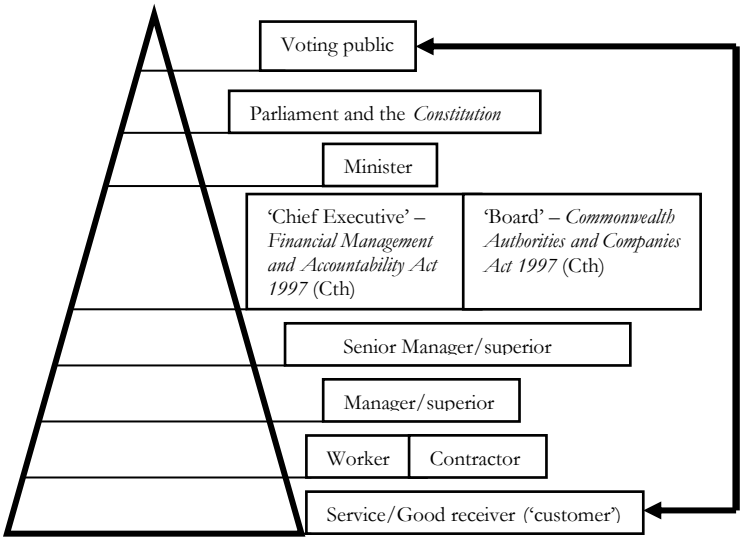
[16] Although there appears to be a shift back towards centralisation: see, for examples, Advisory Group on Reform of Australian Government Administration, *Ahead of the Game: Blueprint for the Reform of Australian Government Administration* (2010) pp x-xi and 45-66 (centralising employment arrangements); Australian Government Information Management Office, *2006 e-Government Strategy, Responsive Government: A New Service Agenda* (2006) pp 21 (project management and investment framework); and so on.

The consequence of these reforms is a distinctive framework of regulation for the public sector within the confines of Australia's evolving democratic experiment. In this context of the 'other' administrative law, conceptions of 'accountability' and 'transparency' have become the central organising principles:[17]

(a) *Accountability (and responsibility)* – A relationship where a person or body is required to supply accurate and timely data or information about its performance so that a view, judgment, decision, or some other means of assessment can be made about that performance. Accountability is essentially about the quality and quantity of performance. Importantly, 'accountability' needs to be distinguished from 'responsibility' – the former being the possibility of scrutiny (hence Parliamentary scrutiny of Executive actions by requiring the production of financial statistics), the latter being the burden of obligation arising from making the decisions and actions of the government (hence a Minister taking responsibility and on rare occasions resigning for making a poor decision).[18] There is generally a hierarchy of accountability (and responsibility) (see Figure 1.1).

(b) *Transparency* – A process where each step is apparent and any views, judgments, decisions, other means of assessments are disclosed so that a third party (and ultimately the public) can know and understand what has been determined and the relevant considerations in making that determination. Transparency is essentially about the process of performance.

Figure 1.1: The hierarchy of accountability
The hierarchy of accountability following the public administration reforms imposed through the *Constitution*, *Financial Management and Accountability Act 1997* (Cth), *Commonwealth Authorities and Companies Act 1997* (Cth), *Auditor-General Act 1997* (Cth), *Charter of Budget Honesty Act 1998* (Cth) and the *Public Service Act 1999* (Cth). In Australia this is somewhat circular as the 'Voting public' is sometimes also the 'Service/Good receiver ("customer")'.



[17] See generally Management Advisory Board and Management Improvement Advisory Committee, *Accountability in the Commonwealth Public Sector* (1993). See also John Halligan, 'Accountability in Australia: Control, Paradox and Complexity' (2007) 31 *Public Administration Quarterly* 453 and the citations therein.

[18] See Peter Loney, 'Executive Accountability to Parliament – Reality or Rhetoric' (2008) 23 *Australasian Parliamentary Review* 157 at 159-160. See also Elaine Thompson and Greg Tillotsen, 'Caught in the Act: The Smoking Gun View of Ministerial Responsibility' (1999) 58 *Australian Journal of Public Administration* 48. This is not a distinction generally made in the Australian Government 'accountability' literature: see, for examples, Australian Public Service Commission, *Delivering Performance and Accountability*, Contemporary Government Challenges (2009) pp 5-6; Management Advisory Board and Management Improvement Advisory Committee, *Accountability in the Commonwealth Public Sector* (1993) p 1. Notably, modern ideals about 'Ministerial responsibility' might be anathema to traditionalislst: 'Ministers are responsible for the overall administration of their portfolios and accountable to the Parliament for the exercise of Ministerial authority': Australian Public Service Commission, *APS Values and Code of Conduct in Practice* (2009) p 14.

The evolution of executive power at the Commonwealth level can potentially be seen as a narrative of expanding Executive authority, declining Parliamentary authority and a Judiciary that has abstained from asserting Parliament's control over the Executive or actively participated in enhancing the domination by the Executive of government. While this narrative can be viewed as a slow debasing of our governmental institutions, it might also be framed positively, allowing our governmental institutions an opportunity to evolve and meet the changing needs of the broader community and develop through learned experience. It is this latter perspective that founds this book and an attempt to expand the current scholarship to embrace the benefits of the recent public administration reforms on executive power within the *Constitution*'s compact. As the book reveals, there is now a sophisticated and complex array of accountability, responsibility and transparency measures in the 'other' administrative law within which the Executive must now act. In effect these measures are regulating the exercise of executive power, arguably making its exercise more accountable, responsible and transparent than at any time in history.

The book is structured according to the kinds of general background data and information about the concepts, institutions and developments that support and enable the (very broad) exercise of executive power (Chapters 1-3), and then an exposition of the form and content of the (very broad) executive power possible under the *Constitution* (Chapter 5). This is followed by an analysis of the frameworks that have been developed to exercise executive power: the Budget (Chapter 6); the financial framework (Chapter 7); and, the employment framework (Chapter 8). The book concludes with some speculation about the future challenges (Chapter 9). The approach of the book is to analyse the relevant cases in detail, addressing the arguments in each of the judgments. This is important as the full scope of executive power traverses the diversity of perspectives of the various High Court judges over the decades, and the exercise of executive power can be justified on the basis of a single credible perspective set out in a High Court judgment. As a matter of legal analysis it is this diversity of perspectives presented by the High Court judgments that are then interpreted by the Parliament and the Executive to justify their actions. For the Executive actually exercising the available power, this is of paramount importance, as it is the Executive that is continuously interpreting and re-interpreting the scope of its powers in conducting its day-to-day business. It is *only* very occasionally that those actions are scrutinised by the Parliament or the Courts. As a consequence, there is a considerable incentive for the Executive to interpret (and re-interpret) its powers as broadly as possible based on its own credible interpretation of the *Constitution* and any decisions or directions from the High Court and the Parliament. As the analysis in the book demonstrates, the diversity of decisions or directions provides the Executive with a very wide canvass. Hopefully this book also provides an insightful overview of executive power and a positive perspective that the public administration reforms have improved (or at least have created the potential for improved) government accountability, responsibility and transparency. The difficult challenge remains, however, of taking advantage of these reforms and subjecting our governments to proper scrutiny by knowing what is being done and how it is being done. The prospect of better government and better governmental outcomes makes that a task worthwhile.

2. Commonwealth expansionism

2.1 The Nation State

Any analysis of executive power must start with the historical context and the modern incarnation of the Nation State that both enables executive power to be exercised and legitimises its exercise.[1] While we accept a global community of Nations with essentially settled boundaries and a global architecture that enables Nation States to communicate and trade, this is a relatively recent phenomenon (as discussed below). The modern Nation State as a means of government is essentially an organisational structure with a capacity to do 'things' and an authority recognised by other Nation States. The organisation structure requires an administration with a bureaucracy to collect taxes, deliver goods and services and field armed forces. The authority recognised by other Nation States is delivered through sending diplomats to other Nations States and the recognition of the diplomats sent from those other Nation States. From this perspective the modern Nation State is a potentially fragile and ephemeral entity relying on recognition from outside and a benign acceptance of authority from those within. Australia's democratic experiment is thus a case study of the modern evolving Nation State phenomenon.

Perhaps a threshold for the modern Nation State was the *Peace of Westphalia* (comprised of the *Treaty of Osnabrück* and the *Treaty of Münster*) in 1648 that marked a significant moment of international political order that has carried through many fundamental ideals to the modern Nation States.[2] The *Peace of Westphalia* mediated a settlement of the acrimonious tension between Protestants and Catholics, and recognised state sovereignty over territory independent of the Holy Roman Empire.[3] In more recent times the Nation States have been confirmed through mutual agreement supporting international organisations, such as the United Nations, that then provide a forum and mechanism to entrench the legitimacy and authority of member Nation States. Thus, the *United Nations Charter* Art 1 provides:

> The Purposes of the United Nations are:
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.[4]

The *United Nations Charter* also details the membership requirements, further entrenching the legitimacy and authority of member Nation States:

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[1] Despite the extensive literature about the decline of the State (and government), they remain the central actor in governmental affairs: see, for an example of a recent analysis confirming the role and place of the State, Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (2009).

[2] See, for example, Leo Gross, 'The Peace of Westphalia 1648-1948' (1948) 42 *American Journal of International Law* 20. Recognising, of course, that political orders reflected in the modern Nation State are continually evolving through disintegrating and reintegrating national boundaries, increasing fragmentation and disintegration of Nation States, and integrating and disintegrating as a consequence of globalisation: see James March and Johan Olsen, 'The Institutional Dynamics of International Political Orders' (1998) 52 *International Organization* 943.

[3] See, for example, Leo Gross, 'The Peace of Westphalia 1648-1948' (1948) 42 *American Journal of International Law* 20 at 21-24 (religious tolerance) and 26-38 (sovereignty).

[4] *United Nations Charter* [1945] *Australian Treaty Series* 1, Art 1.

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.[5]

The modern Commonwealth of Australia fulfils all these elements of being a Nation State, although the evolution to this status has taken time, suffered several false starts and has no settled starting date,[6] with any number of other moments of significance as indications of independence.[7] It is, however, the evolution of government out of England after the Enlightenment, and the clash between the formally all-powerful Crown and the nascent Parliament at Westminster, that has gifted the major elements of the modern Commonwealth of Australia. The goings on in Europe, North America and East Asia have also influenced, often quite significantly, the evolution at Westminster and in Australia, but it is the dominance of the Parliament at Westminster that has been the overwhelming influence for Australia. Despite this unsteady start the Commonwealth of Australia has long been recognised as a separate Nation State by the High Court. For example, in 1907 in *Commissioners of Taxation (NSW) v Baxter* Chief Justice Griffith and Justices Barton and O'Connor stated:

> The object of the advocates of Australian federation, then, was not the establishment of a sort of municipal union, governed by a joint committee, like the union of parishes for the administration of the Poor Laws, say in the Isle of Wight, but the foundation of an Australian Commonwealth embracing the whole continent with Tasmania, having a national character, and exercising the most ample powers of self-government consistent with allegiance to the British Crown.[8]

At the heart of a Nation State's government is the collective authority to do things: this requires a source of authority to raise finance (revenues and moneys) and a source of authority to expend money on delivering services (including governing) and goods. This authority is the executive power that is founded for the Commonwealth of Australia in the *Constitution*.[9]

2.2 The *Constitution*

The origins of Australia's governmental powers trace their beginnings to the statutes of the English Parliament (and in particular the *Constitution* and its attendant conventions, assumptions and implications) or the exercise by the Crown of its surviving (prerogative) powers. The key point being that Australia existed as a nation because it was endorsed, and the ultimate constitutional authority rested with, the British Parliament and the Crown.[10] Thus, the federated Commonwealth of Australia is a creation of law[11] tracing its origins and authority to the *Constitution*.[12] Many others have

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[5] *United Nations Charter* [1945] *Australian Treaty Series* 1, Art 4.

[6] See George Winterton, 'The Acquisition of Independence' and Geoff Lindell, 'Further Reflections on the Date of the Acquisition of Australia's Independence' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) pp 31-50 and 51-59 respectively. See also *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 84 (Gummow, Crennan and Bell JJ).

[7] See also Harold Renfree, *The Executive Power of the Commonwealth of Australia* (1984) pp 32-46. See also *Charter of the United Nations Act* 1945 (Cth) s 5.

[8] *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087 at 1108 (Griffith CJ, Barton and O'Connor JJ).

[9] The legality and legitimacy of the *Constitution* appears to have broad support in Australia, although this is not necessarily without potential to challenge and might be challenged in a coup: see generally John Hatchard and Tunde Ogowewo, *Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth* (2003) pp 18-49 (addressing the jurisprudence emanating from the *State v Dosso* [1958] PLD 533 (Supreme Court of Pakistan)).

[10] Albeit, Australia is now an independent nation: see, for examples, George Winterton, 'The Acquisition of Independence' and Geoff Lindell, 'Further Reflections on the Date of the Acquisition of Australia's Independence' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) pp 31-50 and 51-59 respectively.

[11] The acquisition of sovereignty is not susceptible to judicial review: see, for examples, *Coe v Commonwealth* (1993) 118 ALR 193 at 200 (Mason CJ); *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 15 (Mason CJ and McHugh J), 31-32 (Brennan J), 78-79 (Deane and Gaudron JJ); *Wacando v Commonwealth* (1981) 148 CLR 1 at 11 (Gibbs CJ), 27 (Mason J), 28 (Murphy J), 28 (Aickin J), 30 (Wilson J), 30 (Brennan J); *New South Wales v Commonwealth* (1975) 135 CLR 337 at 388

traversed the historical developments leading to the Commonwealth *Constitution* illustrating the foundational nature of the *Constitution* and its rich heritage.[13] Most importantly, however, it is not an instrument in isolation:

> The Constitution of the Commonwealth … has been built on traditional foundations. Its roots penetrate deep into the past. It embodies the best achievements of political progress, and realises the latest attainable ideals of liberty. It represents the aspirations of the Australian people in the direction of nationhood, so far as is consistent and in harmony with the solidarity of the Empire.[14]

Further, the *Constitution* itself is evolving; taking its rich heritage from the time of Federation and adding to it the expanding and dynamic authority of Australia as an independent nation.[15] In recent times the new reforms in governmental and public administration have also placed new dimensions onto the *Constitution*. In each case, however, the echoes of the past reach through so that knowing the history helps understand and appreciate the present and the possible futures. The *Constitution* details the roles of certain institutions within the Executive but does not detail the form of the institutions, leaving this to be resolved between the Parliament and the Executive – the result is an evolving Executive with ever expanding authority, not only over the expansion of executive power, but also the ability to set the form(s) of the institution of the Executive.[16]

The Commonwealth Executive formally arrived in Australia through the *Constitution of the Commonwealth of Australia Act 1900* (UK) s 9 (the *Constitution*).[17] By this Act a Federation, the Commonwealth of Australia, was established comprising the existing Colonies and their institutions[18] *and* the new Commonwealth together with its new institutions of Parliament (*Constitution* Ch I), the Executive (including some parts of the State Executives transferred to the new Commonwealth; *Constitution* Ch II) and the Judiciary (*Constitution* Ch III). Each of these new Commonwealth institutions exercises their own powers:

(a) *The Parliaments* – The power to make laws in the form of statues and alter laws through the amendment of statutes and statutes overriding law made by the Judiciary. The *Constitution* s 1 providing:

> The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives …

(b) *The Executive* – The power to administer the laws (including the laws made by the Parliament and the Judiciary) and carry on the other business of government including maintaining law and order within and outside jurisdiction (generally the borders). The *Constitution* s 61 providing:

(Gibbs J). Notably, 'the sovereignty of the Australian nation has ceased to reside in the Imperial Parliament and has become embedded in the Australian people': *McGinty v Western Australia* (1996) 186 CLR 140 at 237 (McHugh J). See also *Sue v Hill* (1999) 199 CLR 462 at 491-492 (Gleeson CJ, Gummow and Hayne JJ).

[12] *Commonwealth of Australia Constitution Act 1900* (UK) ss 3 and 4.

[13] See, for examples, John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901); W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910); and so on. See also John Williams, 'The Emergence of the Commonwealth Constitution' in H P Lee and George Winterton, *Australian Constitutional Landmarks* (2003) pp 1-33.

[14] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p vii.

[15] See Leslie Zines, 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (1977) pp 1-49.

[16] See Christos Mantziaris, 'The Executive: A Common Law Understanding of Legal Form and Responsibility' in Robert French, Geoffrey Lindell and Cheryl Saunders, *Reflections on the Australian Constitution* (2003) pp 125-144.

[17] Notably *Constitution of the Commonwealth of Australia Act 1900* (UK) ss 1-8 (known as the 'covering clauses') contains mainly introductory, explanatory and consequential provisions. Perhaps importantly, the executive powers already existed and they were merely being imported to address the new circumstances established by the *Constitution*.

[18] Significantly, the *Constitution* ss 106, 107 and 108 preserved the constitutions, powers and laws of the States subject only to the provisions of the new *Constitution* s 109.

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.

(c) *The Judiciary* – The power to adjudicate disputes, and in the process make laws. The *Constitution* s 71 providing:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

One of the legacies of government resulting from Great Britain was that at Federation in 1901 the Commonwealth was a self-governing colony in the British Empire, subject to various legislative, executive and judicial controls from Great Britain.[19] Although Australia has since then become separately recognisable[20] the progression, so far, is a sovereign, independent and Federal nation exercising powers conferred according to the *Constitution* and State constitutions, albeit with the fabric of sovereignty, independence and federation relying at its foundation on the Parliament and Crown of the United Kingdom.[21] And it is those echoes of the British Parliament and the Crown that are the core structural conceptions in the *Constitution* capturing key developments in Great Britain during the 17th and 18th century. Central to these developments was the clash between the British Parliament and the Crown that was eventually resolved in favour of the British Parliament in what has become known as 'responsible government' (see ¶3.4). More specifically, the political groups in the British Parliament organised into two groupings with the majority in the House of Commons forming 'Government' and the other forming 'Opposition'. The 'Government' party selected from among its members 'Ministers', and from among them an inner grouping known as the 'Cabinet' to make the major decisions. The Ministers in effect exercised the governmental powers of the Crown that by convention were exercised by the Crown on the advice of the Ministers (and Cabinet). As a generalisation the 'Government' implemented policies that were presented to the electorate and directed the exercise of government while the 'Opposition' scrutinised that policy and its implementation (and sometimes proposed alternative policy). These developments were subsequently reflected in the State constitutions and Commonwealth *Constitution* in what is now called the 'Westminster system of government' recognising the supremacy of Parliament and the responsibility of the Executive (the Ministers and those assisting them in the machinery of government) to Parliament.[22] The key difference between governments in Australia and Great Britain is that in Australia there is a Commonwealth with responsibility for exercising

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[19] According to convention in Great Britain, a British colony with a 'responsible' Parliament was not subject to interference by the British Parliament or the Crown unless expressly requested. This has now been clarified by statutes: see *Statue of Westminster Adoption Act 1942* (Cth) s 3 and sch (s 4); *Australia Act 1986* (Cth) s 1. Notably, these provisions do not exclude United Kingdom laws, only their effect in Australia so that an Australian court would be obliged to follow these provisions. Thus, '[s]ection 1 of the *Australia Act* does not purport to exclude, as a matter of the law of the United Kingdom, the effect of statutes thereafter enacted at Westminster. Rather, it denies their efficacy as part of the law of the Commonwealth, the States and the Territories. Section 51(xxxviii) extends to the actual execution within this country of a power of the sort described in that paragraph. The scope of the phrase "within the Commonwealth" in s 51(xxxviii) includes the exercise of legislative power with effect upon the political structures with authority over the geographical area of the Commonwealth, the States and the Territories': *Sue v Hill* (1999) 199 CLR 462 at 491-492 (Gleeson CJ, Gummow and Hayne JJ).

[20] See George Winterton, 'The Acquisition of Independence' and Geoff Lindell, 'Further Reflections on the Date of the Acquisition of Australia's Independence' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) pp 31-50 and 51-59 respectively.

[21] See *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 477-478 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) and the references therein. Importantly, however, the role of the Parliament and Crown of the United Kingdom is now unlikely to have any formal affect on the Australian Parliament and Executive: *Buck v Attorney General* [1965] Ch 745 at 771 (Diplock LJ). See also *Fitzgibbon v HM Attorney General* [2005] EWHC 114 (Ch) at [16] (Lightman J).

[22] See *Constitution* ss 6, 49, 62, 64 and 83.

Legislative, Executive and Judicial powers *as well as* States also exercising (separate) legislative, executive and judicial powers. Some of these concepts are addressed in more detail in Chapter 3. For present purposes, however, it is the balance shifting in favour of the Commonwealth that is significant because this has dramatically increased the authority and reach of the Commonwealth's Executive.

2.3 Commonwealth expansionism

Thus, an important incident of Federation has been the expanding role and authority of the Commonwealth. According to the *Constitution* the spheres of the Commonwealth and State governmental influences (the powers and functions) were separated so that the new Commonwealth had the powers and functions articulated in the *Constitution*, with the remaining powers and functions residing with the States.[23] The *Constitution* was, however, a compromise. One of the key reasons for pursuing a Federation was to promote trade and commerce throughout Australia, by establishing uniform customs arrangements (and in particular customs and excise duties) and removing the protectionist burdens on interstate trade.[24] Central to these objectives was the financial arrangements whereby the new Commonwealth collected revenues and moneys (primarily customs and excise duties)[25] and then shared the surplus between the States.[26] While the constitutional conventions were unable to finally settle the matter (leaving its resolution largely for the future Commonwealth Parliament) the dealings with money were undoubtedly the seed for the expansion of Commonwealth powers over the decades and the consequent diminution of State powers and functions.[27] The outcome of the evolving Federation, therefore, has been a massive expansion of the Commonwealth and the diminution of the States (and Territories). In response there have been calls for a 'new Federalism' that re-balances (in hotly contested ways) the relationships between the Commonwealth and the States. The purpose of the remaining parts of this chapter is to address some of the milestones in the Commonwealth's expansion. This analysis is not intended to be comprehensive, but rather to detail those relevant to appreciating and understanding the assertion of executive power by, and under, the *Constitution* (discussed in Chapter 5). This is critical as an expansion of executive power has profound consequences for Australia's democratic experiment.

2.3.1 Commonwealth expansionism through fiscal arrangements

Perhaps the most significant expansions in the role of the Commonwealth under the *Constitution* was the High Court's ruling in *New South Wales v Commonwealth* ('*Surplus Revenue case*') that provided the

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[23] See, for examples, *New South Wales v Commonwealth* (1975) 135 CLR 337 at 372 (Barwick CJ), 469-470 (Mason J), 498 (Jacobs J); *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82 (Dixon J); *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421 at 439-440 (Isaacs J).

[24] See, for example, *Ha v New South Wales* (1997) 189 CLR 465 at 491-492 (Brennan CJ, McHugh, Gummow and Kirby JJ) and the references therein; *Cole v Whitfield* (1988) 165 CLR 360 at 386 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) and the references therein.

[25] In broad terms, the Commonwealth was to have exclusive power over customs and excise (*Constitution* s 90), more limited power over taxation (s 51(ii)) and a power to borrow money 'on the public credit of the Commonwealth' (s 51(iv)).

[26] See *Constitution* s 94. Although *Constitution* s 95 made special provision for Western Australia.

[27] Notably, a part of this expanding Commonwealth power is associated with the Commonwealth's role in the growth of a 'national character' or 'national identity'. This has been most apparent with the development of the nationhood powers: see, for examples, *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63-64 (French CJ), 89 (Gummow, Crennan and Bell JJ), 115-116 (Hayne and Kiefel JJ); *R v Hughes* (2000) 202 CLR 535 at 554-555 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Davis v Commonwealth* (1988) 166 CLR 79 at 93 (Mason CJ, Deane and Gaudron JJ), 110-111 (Brennan J); *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535 at 560 (Mason J); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 108 (Gibbs CJ), 203 (Wilson J); *Victoria v Commonwealth* (1975) 134 CLR 338 at 370 (McTiernan J), 397 (Mason J), 412-413 (Jacobs J), 424 (Murphy J); *Barton v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J), 505 (Jacobs J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643-644 (Latham CJ). See also R Gates, 'Finance of Government' in R Spann, *Public Administration in Australia* (1973) pp 216-233. Another reason has been the proliferation of Australia's tax transfer arrangements: see Department of the Treasury, *Architecture of Australia's Tax and Transfer System* (2008).

Commonwealth with a technical approach to avoiding the *Constitution*'s surplus revenue provisions,[28] and the obligation to return any surplus revenue to the States (addressed further below; see ¶7.5).[29] This was a stark change in the financial balance in favour of the Commonwealth as the States had depended on customs and excise duties as their major form of revenue collection, and during the Constitutional Conventions there had been a considerable and unresolved debate about the post-Federation financial arrangements.[30] This Commonwealth financial domination was ultimately entrenched by the High Court deciding in *South Australia v Commonwealth* ('*First Uniform Tax Case*') that Commonwealth taxation (and then grants to States) took priority over State taxation,[31] then in *Victoria v Commonwealth* ('*Second Uniform Tax Case*') that there were almost no limits on the conditions the Commonwealth could request before payments were made to States,[32] and then a 'wide view' of the Commonwealth's powers over customs and excise duties excluding almost all State (and Territory) avenues for raising revenue.[33] The result has been a high degree of 'vertical fiscal imbalance'[34] where the Commonwealth controls approximately 82 per cent of all tax revenue collected in Australia (in 2006-2007; or about 25% of GDP)[35] and the States (and Territories) have to rely on significant transfers.[36]

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[28] See *Constitution* s 94 (and s 95 in respect of Western Australia). In respect of the *Constitution* s 95: see *D & N Murray & Co Ltd v Collector of Customs* (1903) 1 CLR 25 (Griffith CJ, Barton and O'Connor JJ).

[29] *New South Wales v Commonwealth* (1908) 7 CLR 179 at 190-191 (Griffith CJ), 193-194 (Barton J), 199 (O'Connor J), 199-202 (Isaacs J), 205-206 (Higgins J). As to the inevitability, see the much cited letter of Alfred Deakin stating 'If [the Commonwealth Parliament] provides money for the States it will exact tribute from them in some shape. As the power of the purse in Great Britain established by degrees the authority of the Commons, it will ultimately establish in Australia the authority of the Commonwealth. The rights of self-government of the States have been fondly supposed to be safeguarded by the *Constitution*. It left them legally free but financially bound to the chariot wheels of the central government': John La Nauze (ed), *Federated Australia: Selections from Letters to the Morning Post 1900-1910* (1968) p 97. This may also be a direct consequence of a federalist structure: see Alan Fenna, 'Commonwealth Fiscal Power and Australian Federalism' (2008) 31 *University of NSW Law Journal* 509 at 513-515.

[30] The finance clauses at the Premiers Conference of 1899 'proved the hardest of all to solve, and nearly caused a break-up of the Conference', with the Melbourne Convention clauses being retained, as 'all other proposals are open to more serious objection': see John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 219. See also R Mathews and W Jay, *Federal Finance: Intergovernmental Financial Relations in Australia since Federation* (1972) pp 18-72.

[31] *South Australia v Commonwealth* (1942) 65 CLR 373 at 429 and 435-436 (Latham CJ), 436 (Rich J), 448-449 (McTiernan J), 463-464 (Williams J).

[32] *Victoria v Commonwealth* (1957) 99 CLR 575 at 610-611 (Dixon CJ), 623 (McTiernan J), 629-630 (Williams J), 642-643 (Webb J), 655 (Fullagar J), 658 (Kitto J), 658 (Taylor J). See also *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 at 592 (Gibbs J), 650-651 (Wilson J); *Pye v Renshaw* (1951) 84 CLR 58 at 83 (Dixon, Williams, Webb, Fullagar and Kitto JJ); *South Australia v Commonwealth* (1942) 65 CLR 373 at 417 (Latham CJ); *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735 at 763-764 (Latham CJ), 767 (Rich J), 770-771 (Starke J), 809 (McTiernan J) (and affirmed in *WR Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338 (Maugham LJ)).

[33] See *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 589-591 (Mason CJ, Brennan, Deane and McHugh JJ) and the cases referred to therein. See also *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 40 (Gleeson CJ), 49 (McHugh, Gummow and Hayne JJ), 70 (Kirby J), 88 (Callinan J); *Ha v New South Wales* (1997) 189 CLR 465 at 499-500 (Brennan CJ, McHugh, Gummow and Kirby JJ). See also Chris Caleo, 'Section 90 and Excise Duties: A Crisis of Interpretation' (1987) 16 *Melbourne University Law Review* 296.

[34] 'Fiscal relations between the Australian government and the States are characterised by vertical fiscal imbalance, whereby the States' own revenue sources are insufficient to fund their expenditure responsibilities, while the Australian government's revenue sources are greater than is necessary to meet its expenditure responsibilities. There are both costs and benefits to this imbalance': Department of the Treasury, *Architecture of Australia's Tax and Transfer System* (2008) p 291. See also Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2009-2010 (2009) p 6.

[35] See Department of the Treasury, *Architecture of Australia's Tax and Transfer System* (2008) pp 291 and 292.

[36] Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2010-2011 (2010) p 6; Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2009-2010 (2009) p 6. See also Department of the Treasury, *Architecture of Australia's Tax and Transfer System* (2008) p 291; Denis James, *Federal-State Financial Relations: The Deakin Prophesy*, Parliamentary Library Research Paper No 17 (2001) pp 4-22. See generally Commonwealth Grants Commission, *Relative Fiscal Capabilities of the States* (2008) for an overview of how the Commonwealth views the State and Territory policy neutral fiscal capacities as a basis to assess shares of various transfers from the Commonwealth. See also Jeffrey Petchey and Perry Shapiro, 'An Economist's View of Section 90' in

To address the concerns about this financial imbalance,[37] and the concern that the States (and Territories) had different capacities to raise revenue or deliver services (called 'horizontal fiscal imbalance'),[38] a complex arrangement for financial transfers was tentatively agreed at the time of Federation[39] and has evolved over time between the Commonwealth and the States (and Territories).[40] In short, the expansion of Commonwealth power through fiscal arrangements has been marked by the expanding powers of the Commonwealth (and the diminishing powers of the States) to collect revenues, *and* then the Commonwealth's authority to impose conditions on payments (or transfers) back to the States and Territories. The conditions on the payments (or transfers) have enabled the Commonwealth to enter into areas that are outside the *Constitution*'s compact (albeit not completely as discussed further below; see ¶7.8) and impose its will.

2.3.2 Commonwealth expansionism through constitutional interpretation

Another significant expansion in the role of the Commonwealth under the *Constitution* was the High Court's ruling in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* where the High Court majority refocused the interpretation of the *Constitution* in favour of Commonwealth's interests rather than the earlier focus on State's interests (overruling the doctrines of implied immunities ('the reciprocal doctrine of non-interference')[41] and sowing the seeds to overrule the doctrine of reserved powers).[42] This was effectively achieved by considering the *Constitution* as an ordinary statute and applying the ordinary principles of statutory interpretation giving each word its ordinary and natural sense subject to a contrary meaning apparent from the *Constitution* as a whole.[43] In other words, the Commonwealth's powers under the *Constitution* were to be interpreted broadly[44] and without reference to what powers the States might retain.[45] The effect over time has been that the High

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Neil Warren (ed), *Reshaping Fiscal Federalism in Australia* (1997) 41; Russell Mathews and Bhajan Grewal, *The Public Sector in Jeopardy: Australian Fiscal Federalism from Whitlam to Keating* (1997); Chris Caleo, 'Section 90 and Excise Duties: A Crisis of Interpretation' (1987) 16 *Melbourne University Law Review* 296. See also Russell Mathews and W Jay, *Federal Finance: Intergovernmental Financial Relations in Australia since Federation* (1972).

[37] These concerns have been a significant point of contention between the Commonwealth and the States (and Territories) since Federation: see, for examples, Department of the Treasury, *Architecture of Australia's Tax and Transfer System* (2008) pp 198-199; Campbell Sharman, 'Executive Federalism' in Brian Galligan, Owen Hughes and Cliff Walsh (eds), *Intergovernmental Relations and Public Policy* (1991) pp 26-27.

[38] Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2010-2011 (2010) pp 6-7; Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2009-2010 (2009) pp 6-7. See also Richard Webb, *Horizontal Fiscal Equalisation*, Parliamentary Library Research Note No 22 (2002).

[39] See *Constitution* s 96. See also Cheryl Saunders, 'The Hardest Nut to Crack: The Financial Settlement in the Commonwealth *Constitution*' in Greg Craven (ed), *The Convention Debates 1891-98: Commentaries, Indices and Guide* (1986) pp 149 and 171.

[40] Department of the Treasury, *Architecture of Australia's Tax and Transfer System* (2008) pp 191-199. See also Ross Garnaut and Vincent Fitzgerald, *Review of Commonwealth-State Funding*, Final Report (2002).

[41] Robert Garran, 'The Development of the Australian Constitution' (1924) 40 *Law Quarterly Review* 202 at 215.

[42] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 146-155 (Knox CJ, Rich, Isaacs and Starke JJ), 164 (Higgins J). See also, among the voluminous literature about the decision and its implications, John Nethercote, 'The Engineer's Case: Seventy Five Years On' in Samuel Griffith Society, *Upholding the Australian Constitution Volume 6*, Proceedings of the 6th Conference of the Samuel Griffith Society (1995) pp 239-256.

[43] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 148-151 (Knox CJ, Rich, Isaacs and Starke JJ), 161-162 (Higgins J).

[44] See also, for examples, *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (and 525 (Kirby J)); *Singh v Commonwealth* (2004) 222 CLR 322 at 348 (McHugh J), 384 (Gummow, Hayne and Heydon JJ); and so on.

[45] See *Victoria v Commonwealth* (1971) 122 CLR 353 at 395-397 (Windeyer J). For a recent statement: 'What was discarded in the *Engineers' Case* was an approach to constitutional construction that started in a view of the place to be accorded to the States formed independently of the text of the *Constitution*': *New South Wales v Commonwealth* (2006) 229 CLR 1 at 119 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also Andrew Lynch and George Williams, 'Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible' (2008) 31 *University of New South Wales Law Journal* 395 at 406-414; Cheryl Saunders, 'Interpreting the *Constitution*' (2004) 15 *Public Law Review* 289 at 289-292.

Court has expanded the powers of the Commonwealth, giving the *Constitution*'s legislative powers their widest possible meanings.[46] Since the decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* the range of constitutional interpretative approaches have evolved,[47] albeit the Commonwealth has retained its expanded powers with respect to the States, and in many instances expanded them yet further.[48] This has been demonstrated most recently in *New South Wales v Commonwealth* (*'Work Choices'*) where the High Court validated a Commonwealth law that substantially expanded the reach of the Commonwealth's authority.[49] The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amended the *Workplace Relations Act 1996* (Cth) to expand the role of individual workplace contracts, limit the scope of mandatory entitlements and establish the Australian Fair Pay Commission to determine minimum wage levels.[50] Traditionally workplace relations have been addressed under the *Constitution*'s s 51(xxxv) conciliation and arbitration power, although the s 51(xx) corporation power was accepted to have some role.[51] The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amendment altered this approach by principally founding the new law on the *Constitution* s 51(xx) corporations power.[52] This was achieved through the definition arrangements in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amendment: an 'employee' was defined as being a person engaged by an 'employer' that included 'a constitutional corporation, so far as it employs, or usually employs, an individual', and a 'constitutional corporation' being a *Constitution* s 51(xx) corporation referring to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth.[53] The sting in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) approach was that the formulation of the law was intended to broadly cover all employers and employees including those formerly bound by State based industrial arrangements under State laws.[54] The High Court majority of Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan noted that:

> The definitions of employee and employer invoke other heads of power as well as the corporations power. Even so, in its practical application the new Act depends in large measure upon the assumption that the corporations power is capable of sustaining the legislative framework. Accordingly, the validity of that assumption was the matter to which the primary submissions of a number of the parties were directed.[55]

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[46] For an overview of developments from Federation: see generally James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245. For an analysis of interpretive trends see Nicholas Aroney, 'Constitutional Choices in the Work Choices Case, or What Exactly is Wrong with the Reserved Powers Doctrine?' (2008) 32 *Melbourne University Law Review* 1.

[47] There is an extensive literature on interpretative critiques of the High Court's various approaches: see, for examples, Goldsworthy, 'Interpreting the Constitution in Its Second Century' (2000) 24 *Melbourne University Law Review* 677; Greg Craven, 'Cracks in the Facade of Literalism: Is There an Engineer in the House?' (1992) 18 *Melbourne University Law Review* 540; Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1; Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Engineers' Case and Federalism' (2002) 76 *Australian Law Journal* 678; and so on.

[48] See, for a recent example, *New South Wales v Commonwealth* (2006) 229 CLR 1 at 121-122 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also Andrew Stewart and George Williams, *Work Choices: What the High Court Said* (2007) pp 166-175

[49] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 182 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[50] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 58-68 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 191 (Kirby J), 249 (Callinan J).

[51] See *New South Wales v Commonwealth* (2006) 229 CLR 1 at 69-71 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 183-187 (Kirby J), 247-248 (Callinan J). Notably, the *Industrial Relations Reform Act 1993* (Cth) had relied in part of the *Constitution* s 51(xx).

[52] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 55 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 192 (Kirby J), 247 (Callinan J).

[53] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 59-60 and 135 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 192-193 (Kirby J), 251-252 (Callinan J).

[54] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 60 and 68-69 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[55] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 60 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

The plaintiffs variously sought to argue that the Commonwealth's s 51(xx) powers were limited[56] with echoes of the doctrines of implied immunities and reserve powers and assertions about the 'federal balance'.[57] The High Court majority rejected these arguments restating the proposition that 'the heads of legislative power in s 51 are to be construed "with all the generality which the words used admit"',[58] albeit they appear to accept there might be 'a point at which the legislative powers of the Federal Parliament and the legislative powers of the States are to be divided lest the federal balance be disturbed'.[59] The proposition was rejected in this case because no substance had been submitted:

> But to be valuable, the proposition, that a particular construction of s 51(xx) would or would not impermissibly alter the federal balance, must have content, and the plaintiffs made no attempt to define that content.[60]

The result for the majority was to find every aspect of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) valid,[61] accepting and condoning the Commonwealth's constitutional interpretations and actions in considerably expanding its role in what had traditionally been a domain of the States.[62] In effect the High Court majority accepted the Commonwealth's very broad claims:

> The Commonwealth submitted that a law 'directed specifically to constitutional corporations', in the sense that the law creates, alters or impairs the rights, powers, liabilities, duties or privileges of such a corporation, is supported by s 51(xx). This the Commonwealth described as 'a "direct" connection'. The Commonwealth further submitted that previous decisions of this Court showed that other, less direct, forms of connection between a law and constitutional corporations are not so 'insubstantial, tenuous or distant' as to deny its characterisation as a law with respect to that subject matter. Four forms of connection were said to be supported by authority: (a) a law relating to the conduct (in the relevant capacity) of those who control, work for, or hold shares or office in constitutional corporations; (b) a law relating to the business functions, activities or relationships of constitutional corporations; (c) a law protecting a constitutional corporation from conduct that is carried out with intent to, and the likely effect of which would be to, cause loss or damage to the business of, or interfere with the trading activities of, a constitutional corporation; and (d) a law which otherwise, in its practical operation, 'materially affect[s]' or has 'some beneficial or detrimental effect on' a constitutional corporation (footnotes omitted).[63]

While there is a limit to the Commonwealth's legislative powers that upset the federal balance, it seems that balance is very much in the Commonwealth's favour.

2.3.3 Commonwealth expansionism through Commonwealth superiority

Commonwealth superiority might more pointedly be said to be the degree to which the Commonwealth may interfere in the government functions of States.[64] The early decisions of the

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[56] See *New South Wales v Commonwealth* (2006) 229 CLR 1 at 74-121 and 122-131 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[57] See *New South Wales v Commonwealth* (2006) 229 CLR 1 at 118-121 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 201 and 222-229 (Kirby J), 320-333 (Callinan J).

[58] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 117 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) citing *Fencott v Muller* (1983) 152 CLR 570 (Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ); *State Superannuation Board (Vic) v Trade Practices Commission* (1982) 150 CLR 282 (Gibbs CJ, Mason, Murphy, Wilson and Deane JJ); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ); *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 (Barwick CJ, Gibbs, Stephen, Mason, Jacobs, Murphy and Aickin JJ).

[59] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 120 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[60] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 121 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[61] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 136, 138, 140, 141, 143, 144, 145, 147, 148, 149, 151, 155, 159, 169, 174 and 182 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[62] For an analysis see, for example, Nicholas Aroney, 'Constitutional Choices in the Work Choices Case, or What Exactly is Wrong with the Reserved Powers Doctrine?' (2008) 32 *Melbourne University Law Review* 1. See also Simon Evans, Colin Fenwick, Cheryl Saunders, Joo-Cheong Tham, Megan Donaldson, *Work Choices: The High Court Challenge* (2007); Andrew Stewart and George Williams, *Work Choices: What the High Court Said* (2007).

[63] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 76 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[64] This is notably limited by the *Judiciary Act 1903* (Cth) s 64 submitting the Commonwealth Executive to State law once a 'suit' has been commenced: see *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263-266 (Gibbs CJ,

High Court suggested the Commonwealth and States were entirely separate.[65] This approach was curtailed[66] and then refined leading to the proposition articulated by Justice Dixon in *Melbourne Corporation v Commonwealth*:[67]

> The prima facie rule is that a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies. That, as I have pointed out more than once, is the effect of the [*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*] stripped of embellishment and reduced to the form of a legal proposition. It is subject, however, to certain reservations … [including] … the use of federal legislative power to make, not a general law which governs all alike who come within the area of its operation whether they are subjects of the Crown or the agents of the Crown in right of a State, but a law which discriminates against States, or a law which places a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers … Legislation of that nature discloses an immediate object of controlling the State in the course which otherwise the Executive Government of the State might adopt, if that Government were left free to exercise its authority.[68]

Subsequent High Court decisions have considered and developed this basic proposition.[69] Thus in *Austin v Commonwealth* where a judge of the Supreme Court of New South Wales[70] challenged the validity of a Commonwealth tax applying to them under the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997* (Cth) and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth).[71] The State judges were entitled to retirement benefits under the *Judges' Pensions Act 1953* (NSW) that would have been reduced through tax by the Commonwealth legislation either as an

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Mason, Wilson, Deane and Dawson JJ) challenging the decision in *Maguire v Simpson* (1977) 139 CLR 362 at 377, 380-381 and 388 (Gibbs J), 400 (Mason J), 405 (Jacobs J), 407 (Murphy J). See also Leslie Zines, 'The Binding Effect of State Law on the Commonwealth' in Matthew Groves (ed), *Law and Government in Australia* (2005) pp 1-3; Igor Mescher, 'Wither Commonwealth Immunity?' (1998) 17 *Australian Bar Review* 23.

[65] See, for examples, *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1132-1133 (Griffith CJ, Barton and O'Connor JJ); *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 at 533-538 (Griffith CJ, Barton and O'Connor JJ); *Deakin v Webb* (1904) 1 CLR 585 at 623 (Griffith CJ), 626 (Barton J), 630 (O'Connor J); *D'Emden v Pedder* (1904) 1 CLR 91 at 109-111 (Griffith CJ, Barton and O'Connor JJ).

[66] See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 144-145 (Knox CJ, Isaacs, Rich and Starke JJ).

[67] See *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 681-682 (Dixon J); *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 390 (Dixon J). See also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 55 and 60-61 (Latham CJ), 66 (Rich J), 74 (Starke J), 99 (Williams J). For an analysis of the various nuances and consequences of the decision in *Melbourne Corporation v Commonwealth*: see Catherine Penhallurick, 'Commonwealth Immunity as a Constitutional Implication' (2001) 29 *Federal Law Review* 151.

[68] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 78-79 (Dixon J).

[69] See, for examples, *Austin v Commonwealth* (2003) 215 CLR 185 at 212-222 (Gleeson CJ), 245-267 (Gaudron, Gummow and Hayne JJ), 275-276 and 277-285 (McHugh J), 288-289, 296-308 and 311-313 (Kirby J); *Victoria v Commonwealth* (1995) 187 CLR 416 at 497-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), 573 (Dawson J); *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 226-235 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), 249-250 (Dawson J); *Western Australia v Commonwealth* (1995) 183 CLR 373 at 480 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 172-173 (Mason CJ, Deane, Toohey and Gaudron JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 199 and 202 (Dawson J); *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 355-356 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), 359-365 (Brennan J), 372-374 (Deane J); *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 205-209 (Gibbs CJ), 211-221 (Mason J), 222-230 (Wilson J), 230-242 (Brennan J), 244-251 (Deane J), 258-262 (Dawson J); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 128 (Mason J), 214-215 (Brennan J), 280-281 (Deane J); *Victoria v Commonwealth* (1971) 122 CLR 353 at 370-383 (Barwick CJ), 387-393 (Menzies J), 402-404 (Windeyer J), 405 (Owen J), 406-413 (Walsh J), 416-426; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 183-185 (Latham CJ), 304-305 and 325-326 (Starke J), 335-338 (Dixon J), 397 (McTiernan J).

[70] Notably, the Master of the Supreme Court of Victoria also challenged but was found not to be subject to the Commonwealth Acts: see *Austin v Commonwealth* (2003) 215 CLR 185 at 207 (Gleeson CJ), 235-237 (Gaudron, Gummow and Hayne JJ), 275-276 (McHugh J), 296 (Kirby J).

[71] *Austin v Commonwealth* (2003) 215 CLR 185 at 206 (Gleeson CJ), 222-223 (Gaudron, Gummow and Hayne JJ).

annual surcharge or as a lump sum (including compound interest) on retirement.[72] Significantly, for judges the surcharge was payable by the judge personally while for other 'high income earners' the amount was payable by their superannuation fund (and presumably passed on to the member).[73] The questions reserved for the High Court were, in part, whether the impugned Commonwealth Acts were invalid in their application to a State judge as a matter of necessary implication from the federal nature of the *Constitution*.[74] The result was that a majority comprising Chief Justice Gleeson and Justices Gaudron, McHugh, Gummow and Hayne found the impugned Commonwealth Acts invalid for various reasons.[75] The significance of the various decisions illustrates the disparate and uncertain evolution of the basic proposition from *Melbourne Corporation v Commonwealth*. The current status of the *Melbourne Corporation v Commonwealth* principle would appear to be an implication in the *Constitution* that Commonwealth Acts that seek to prevent or impede the essential functions of a State (whether the one limb favoured by Justices Gaudron, Gummow, Kirby and Hayne or the two limbs favoured by Justice McHugh and probably Chief Justice Gleeson)[76] will be invalid. As to what constitutes a sufficient encroachment by the Commonwealth Act, this appears to be a matter of judgment of the particular judges. The problems, however, appear to emerge in the areas of taxing States and their institutions and entities, and imposing conditions on employment of State officials and employees.[77] These authorities are a significant limitation on the State's operations, albeit decisions like *Austin v Commonwealth* confirm the Commonwealth's interventions are not unlimited.

2.3.4 The Commonwealth's constitutional immunity from State laws

This might more specifically be said to be the degree to which a State law may bind the Commonwealth.[78] The early High Court decisions considered that the Commonwealth and the States were entirely separate and that State laws could not bind the Commonwealth, and visa versa.[79] This approach was curtailed[80] and in a series of later decisions lead to the broadly accepted proposition of Justice Fullagar in *Commonwealth v Bogle*:[81]

> The question whether a particular State Act binds the Crown in right of a State is a pure question of construction. The Crown in right of the State has assented to the statute, and no constitutional question arises. If we ask whether the same statute binds the Crown in right of the Commonwealth, a question of construction may arise on the

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[72] *Austin v Commonwealth* (2003) 215 CLR 185 at 206 and 207-208 (Gleeson CJ), 225-227 (Gaudron, Gummow and Hayne JJ).

[73] See *Austin v Commonwealth* (2003) 215 CLR 185 at 238-239 (Gaudron, Gummow and Hayne JJ).

[74] See also *Austin v Commonwealth* (2003) 215 CLR 185 at 223 and 264 (Gaudron, Gummow and Hayne JJ), 285 (Kirby J).

[75] *Austin v Commonwealth* (2003) 215 CLR 185 at 219 and 222 (Gleeson CJ), 267 and 275 (Gaudron, Gummow and Hayne JJ), 275 and 285 (McHugh J).

[76] Chief Justice Gleeson does not explicitly adopt the language of the one or two limbs, albeit his analysis is conducted according to these different limbs: see *Austin v Commonwealth* (2003) 215 CLR 185 at 216-220 (Gleeson CJ).

[77] See Anne Twomey, 'Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind one Another' (2003) 31 *Federal Law Review* 507 at 519-525.

[78] This is notably limited by the *Judiciary Act 1903* (Cth) s 64 submitting the Commonwealth Executive to State law once a 'suit' has been commenced: see *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263-266 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ) challenging the decision in *Maguire v Simpson* (1977) 139 CLR 362 at 377, 380-381 and 388 (Gibbs J), 400 (Mason J), 405 (Jacobs J), 407 (Murphy J). See also Leslie Zines, 'The Binding Effect of State Law on the Commonwealth' in Matthew Groves (ed), *Law and Government in Australia* (2005) pp 1-3; Igor Mescher, 'Wither Commonwealth Immunity?' (1998) 17 *Australian Bar Review* 23.

[79] See, for examples, *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1132-1133 (Griffith CJ, Barton and O'Connor JJ); *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 at 533-538 (Griffith CJ, Barton and O'Connor JJ); *Deakin v Webb* (1904) 1 CLR 585 at 623 (Griffith CJ), 626 (Barton J), 630 (O'Connor J); *D'Emden v Pedder* (1904) 1 CLR 91 at 109-111 (Griffith CJ, Barton and O'Connor JJ).

[80] See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 144-145 (Knox CJ, Isaacs, Rich and Starke JJ).

[81] See, for examples, *Commonwealth v Bogle* (1953) 89 CLR 229 at 249 (Dixon CJ), 255 (Webb J), 274 (Kitto J); *Re Foreman & Sons Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 529-531 (Dixon J); *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 77-83 (Dixon J); *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 at 18-24 (Dixon J); *West v Deputy Commissioner of Taxation* (NSW) (1937) 56 CLR 657 at 683 (Dixon J); *Pirrie v McFarlane* (1925) 36 CLR 170 at 184 (Knox CJ), 213-215 (Higgins J), 226-229 (Starke J).

> threshold. In considering that question we are, or should be, assisted by a presumption that references to the Crown are references to the Crown in right of the State only. If the answer to the question of construction be that the statute in question does purport to bind the Crown in right of the Commonwealth, then a constitutional question arises. The Crown in right of the State has assented to the statute, but the Crown in right of the Commonwealth has not, and the constitutional question, to my mind, is susceptible of only one answer, and that is that the State Parliament has no power over the Commonwealth. The Commonwealth – or the Crown in right of the Commonwealth, or whatever you choose to call it – is, to all intents and purposes, a juristic person, but it is not a juristic person which is subjected either by any State Constitution or by the Commonwealth Constitution to the legislative power of any State Parliament. If, for instance, the Commonwealth Parliament had never enacted s 56 of the *Judiciary Act 1903* (Cth), it is surely unthinkable that the Victorian Parliament could have made a law rendering the Commonwealth liable for torts committed in Victoria. The Commonwealth may, of course, become affected by State laws. If, for example, it makes a contract in Victoria, the terms and effect of that contract may have to be sought in the *Goods Act 1928* (Vic).[82]

The subsequent decisions have created some uncertainty, it being unclear exactly when the Commonwealth 'become[s] affected by State laws'. In *Commonwealth v Cigamatic Pty Ltd (in liq)* the Commonwealth and the Commissioner of Taxation sought to recover telephone charges under the *Post and Telegraph Act 1901* (Cth) and sales taxes under the *Sales Tax Assessment Act (No 1) 1930* (Cth) respectively.[83] The Commonwealth and the Commissioner of Taxation asserted that as these were debts to the Crown in right of the Commonwealth they should be given priority to debts owing to ordinary creditors not being debts secured over assets of the company recognising the prerogative[84] that Crown debts take priority.[85] The *Companies Act 1936* (NSW), however, prescribed a different order of priority.[86] The issue was essentially how to resolve the conflict between a Commonwealth prerogative and State laws, and whether 'an exercise of State legislative power may directly derogate from the rights of the Commonwealth with respects to its people'?[87] The High Court majority concluded that it was beyond the power of the State of New South Wales to bind the Crown in right of the Commonwealth by the *Companies Act 1936* (NSW).[88] The significance of this decision, however, has been the judgment of Chief Justice Dixon, stating:[89]

> If you express the priority belonging to the Commonwealth as a prerogative of the Crown in right of the Commonwealth, the question is whether the legislative powers of the States could extend over one of the prerogatives of the Crown in right of the Commonwealth. If, as in modern times I think it is more correct to do, you describe it as a fiscal right belonging to the Commonwealth as a government and affecting its Treasury, it is a question of State legislative power affecting to control or abolish a federal fiscal right. It is not a question of the authority of the power of a State to make some general law governing the rights and duties of those who enter into some description of transaction, such as the sale of goods, and of the Commonwealth in its executive arm choosing to enter into a transaction of that description. It is not a question of the exercise of some specific grant of power which according to the very meaning of the terms in which it is defined embraces the subject matter itself: for it is not the plan of the *Constitution* to grant specific powers to the States over defined subjects. It is, I think, a question which cannot be regarded as simply governed by the applicability of the principles upon which *Melbourne Corporation v Commonwealth* depended. In truth it imports a principle which if true would apply generally with respect to the legal rights of the Commonwealth in relation to its subjects. I do not speak of legal rights which are the immediate product of federal statute and so protected by s 109 of the *Constitution*.[90]

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[82] *Commonwealth v Bogle* (1953) 89 CLR 229 at 259-260 (Fullagar J).

[83] *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 376 (Dixon CJ), 381 (Taylor J).

[84] In this instance: 'It is said to be "an incontrovertible rule of law, that where the King's and the subject's title concur, the King's shall be preferred" and that "Except so far as the Legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community"' (citations and footnotes omitted): *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 383 (Taylor J).

[85] *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 376-377 (Dixon CJ), 383 (Taylor J), 389-390 (Menzies J).

[86] *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 376 (Dixon CJ), 389-390 (Menzies J).

[87] *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 377 (Dixon CJ).

[88] *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 379 (Dixon CJ), 381 (Kitto J), 381 and 388 (Taylor J), 390 (Menzies J), 390 (Windeyer J), 390 (Owen J).

[89] See generally Catherine Penhallurick, 'Commonwealth Immunity as a Constitutional Implication' (2001) 29 *Federal Law Review* 151.

[90] *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 378 (Dixon CJ).

The result was to overrule the earlier decision in *Re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* and essentially adopt the dissenting opinion of the then Justice Dixon.[91] There Justice Dixon had said:

> Can s 282 of the *Companies Act 1936* of New South Wales operate as a local statute to limit or destroy this priority of the Commonwealth? This is perhaps the chief question in the case and my answer to it is a very definite denial of the constitutional competence of the State to prescribe for the Commonwealth the relative rights of the subjects of the Crown and the Crown in right of the Commonwealth in a competition between them.
>
> We are here concerned with nothing but the relation between the Crown in right of the Commonwealth as a creditor for public moneys and the subjects of the Crown as creditors for private moneys. There are no conflicting claims between State and Commonwealth. The conflict is between the Commonwealth and its own subjects. What title can the State have to legislate as to the rights which the Commonwealth shall have as against its own subjects?
>
> The fact that the priority claimed by the Commonwealth springs from one of the prerogatives of the Crown is an added reason, a reason perhaps conclusive in itself, for saying that it is a matter lying completely outside State power. But there is the antecedent consideration that to define or regulate the rights or privileges, duties or disabilities, of the Commonwealth in relation to the subjects of the Crown is not a matter for the States. General laws made by a State may affix legal consequences to given descriptions of transaction and the Commonwealth, if it enters into such a transaction, may be bound by the rule laid down. For instance, if the Commonwealth contracts with a company the form of the contract will be governed by s 348 of the *Companies Act*. Further, State law is made applicable to matters in which the Commonwealth is a party by s 79 of the *Judiciary Act*. But these applications of State law, though they may perhaps be a source of confusion, stand altogether apart from the regulation of the legal situation which the Commonwealth, as a Government, shall occupy with reference to private rights.[92]

The proposition broadly stated following *Commonwealth v Cigamatic Pty Ltd (in liq)* is that the States may not define or regulate the rights or privileges, duties or disabilities of the Crown in right of the Commonwealth in relation to its subjects.[93] How broadly this proposition extends remains unsettled, as clearly the Commonwealth (and its various emanations) *is* subject to some State laws.[94] Thus in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* the then Defence Housing Authority, a body corporate established by the *Defence Housing Authority Act 1987* (Cth), entered into a lease with the owner of the premises and then subleased the premises as residential accommodation for personnel of the defence force and the Department of Defence.[95] The lease was subject to the *Residential Tenancies Act 1987* (NSW) that allowed the owner to apply to the Residential Tenancies Tribunal for an order authorising entry into the premises.[96] The Defence Housing Authority sought an order preventing the hearing by the Residential Tenancies Tribunal for an order authorising entry into the premises.[97] The Defence Housing Authority asserted, in part, that it was immune to the application of the *Residential Tenancies Act 1987* (NSW) because of an implied constitutional immunity from State legislation.[98]

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[91] See *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 377-378 (Dixon CJ), 381 (Kitto J), 389 (Menzies J), 390 (Windeyer J), 390 (Owen J).

[92] *Re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 528 (Dixon J).

[93] *Re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 528 (Dixon J). See also *Commonwealth v Bogle* (1953) 89 CLR 229 at 249 (Dixon CJ), 255 (Webb J), 259-260 (Fullagar J), 274 (Kitto J), 284 (Taylor J); *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 376-378 (Dixon CJ), 381 (Kitto J), 389-390 (Menzies J), 390 (Windeyer J), 390 (Owen J).

[94] Recent examples include *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51 at 78-79 (Gummow J); *Commonwealth v Western Australia* (1999) 196 CLR 392 at 471-472 (Hayne J). See also Catherine Penhallurick, 'Commonwealth Immunity as a Constitutional Implication' (2001) 29 *Federal Law Review* 151 at 152-160 and the references therein.

[95] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 428-429 (Dawson, Toohey and Gaudron JJ), 449 (McHugh J), 461 (Gummow J), 476 (Kirby J).

[96] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 428 (Dawson, Toohey and Gaudron JJ), 449 (McHugh J), 462 (Gummow J), 477 (Kirby J).

[97] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 428-429 (Dawson, Toohey and Gaudron JJ), 449 (McHugh J), 462 (Gummow J), 477 (Kirby J).

[98] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 429 (Dawson, Toohey and Gaudron JJ), 449 (McHugh J), 462 (Gummow J), 478 (Kirby J).

The majority of Chief Justice Brennan and Justices Dawson, Toohey and Gaudron considered the *Commonwealth v Cigamatic Pty Ltd (in liq)* decision and found that the *Residential Tenancies Act 1987* (NSW) could not validly restrict or modify the capacities (and functions) of the Commonwealth Executive, although such a law might validly regulate the Executive carrying out those activities.[99] This result drew a distinction between 'capacities' (and 'functions') of the Crown in right of the Commonwealth[100] and the 'exercise of its capacities' (and 'functions').[101] The term 'capacities' (and 'functions') meaning: 'the rights, powers, privileges and immunities which are collectively described as the "executive power of the Commonwealth" in s 61 of the *Constitution*'.[102] For Chief Justice Brennan the effect was:

> … there is no reason why the Crown in right of the Commonwealth should not be bound by a State law of general application which governs transactions into which the Crown in right of the Commonwealth may choose to enter. The executive power of the Commonwealth, exercised by its choice to enter the transaction, is not affected merely because the incidents of the transaction are prescribed by a State law. That, I understand, was the view which Dixon CJ was expressing in … [*Commonwealth v Cigamatic Pty Ltd (in liq)*]'.[103]

For Justices Dawson, Toohey and Gaudron there was a similar effect:

> The purpose in drawing a distinction between the capacities of the Crown and the exercise of them is to draw a further distinction between legislation which purports to modify the nature of the executive power vested in the Crown – its capacities – and legislation which assumes those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities … The [Defence Housing Authority] is the creature of the *Defence Housing Authority Act* [*1987* (Cth)] and [the *Residential Tenancies Act 1987* (NSW)] is predicated upon the existence of a legal system of which the *Residential Tenancies Act* [*1987* (NSW)] forms a part. The latter Act does nothing to alter or deny the function of the [Defence Housing Authority], notwithstanding that it regulates activities carried out in the exercise of that function in the same way as it regulates the same activities on the part of others. If, and to the extent that, the [Defence Housing Authority] in carrying out its functions is acting in the exercise of the executive capacity of the Commonwealth, the *Residential Tenancies Act* [*1987* (NSW)] neither alters nor denies that capacity notwithstanding that it regulates its exercise.[104]

Justices McHugh and Gummow also addressed the *Commonwealth v Cigamatic Pty Ltd (in liq)* decision and found that its status was unmoved.[105] Thus, Justice McHugh stated:

> It follows from [*Commonwealth v Cigamatic Pty Ltd (in liq)*] that, once the executive power of the Commonwealth arising from s 61 of the *Constitution* has authorised a relationship creating rights and duties, a State has no power to alter that relationship even by a law that operates generally within the State. I do not think that the validity of this proposition turns on any distinction between the capacities of the Commonwealth and the exercise of them. It is

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[99] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 428 (Brennan CJ), 447 (Dawson, Toohey and Gaudron JJ).

[100] Notably, for the majority the status of the Defence Housing Authority as a statutory corporation under the *Defence Housing Authority Act 1987* (Cth) was not determinative and was addressed as the 'Crown in right of the Commonwealth', although it may be significant as entities independent of ministerial and other governmental controls may *not* be possessed of the immunities and privileges of the Crown: see *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 428 (Brennan CJ), 447-448 (Dawson, Toohey and Gaudron JJ). See also, for example, *Austral Pacific Group Ltd (in liq) v AirServices Australia* (2000) 203 CLR 136 at 143 (Gleeson CJ, Gummow and Hayne JJ), 156-157 (McHugh J).

[101] See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424 (Brennan CJ), 438-439 (Dawson, Toohey and Gaudron JJ).

[102] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424 (Brennan CJ), 438-439 (Dawson, Toohey and Gaudron JJ). See also the progenitors of this conception: *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 378 (Dixon CJ); *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 528 (Dixon J); *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 682 (Dixon CJ).

[103] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427 (Brennan CJ) citing *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 377-378 (Dixon CJ).

[104] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 439 and 447 (Dawson, Toohey and Gaudron JJ).

[105] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 454 (McHugh J), 469-470 and 472 (Gummow J).

> not a distinction which I find illuminating in this constitutional context. Nor can I see anything in the judgment of Dixon CJ in [*Commonwealth v Cigamatic Pty Ltd (in liq)*] which supports such a distinction.[106]

Justice Kirby rejected that there was any such doctrine of Commonwealth immunity from State legislation:

> I disagree with the constitutional immunity urged by [Defence Housing Authority] in these proceedings based on [*Commonwealth v Bogle*] and [*Commonwealth v Cigamatic Pty Ltd (in liq)*]. No such doctrine is expressly stated in the *Constitution*. Although implications may arise from the text and structure of the *Constitution*, to be viable, they must be 'logically or practically necessary' to the operation of the *Constitution*. Given the relative inflexibility of the *Constitution*, and its resistance to formal amendment, the derivation of implications, not expressly stated and thus approved and impliedly accepted by the people of Australia, must be kept to cases where the implication is obvious, necessary and can be precisely defined. An immunity of the scope urged in these proceedings by [Defence Housing Authority] meets none of these criteria (footnotes omitted).[107]

Instead Justice Kirby favoured the approach in *Melbourne Corporation v Commonwealth*: 'that decision seems a much sounder foundation from which to derive a coherent implied immunity of the Commonwealth than any offered in the Cigamatic line of cases … a State Parliament could not, by legislation, single out the Commonwealth for discriminatory treatment'.[108]

The result of these various decisions is that the doctrine of immunity remains contested.[109] Following the majority in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* suggests that 'capacities' (and 'functions') of the Crown in right of the Commonwealth are immune from State laws, while the 'exercise of its capacities' (and 'functions') are not.[110] In this context the term 'capacities' and 'functions' means 'the rights, powers, privileges and immunities which are collectively described as the "executive power of the Commonwealth" in s 61 of the *Constitution*'.[111] The practical effect of these propositions is, therefore, an approach to assessing the likely effect of the State law, according to Chief Justice Brennan:[112]

> A State law which purports on its face to impose a burden on the Crown in right of the Commonwealth fails for one of two reasons. If the burden falls on the enjoyment of the Commonwealth prerogative, the law would be offensive to s 61 of the *Constitution*; if it falls on the enjoyment of a statutory power, it would be inconsistent with the Commonwealth law conferring the power and would be invalid by reason of s 109. State legislative power,

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[106] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 454 (McHugh J).

[107] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 503-504 (Kirby J).

[108] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 507 (Kirby J).

[109] For other analyses see Leslie Zines, 'The Binding Effect of State Law on the Commonwealth' in Matthew Groves (ed), *Law and Government in Australia* (2005) pp 7-16; Anne Twomey, 'Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another' (2003) 31 *Federal Law Review* 507. For an elegant example of the complexity consider the mirror tax arrangements between the Commonwealth and States: see *Allders International Pty Ltd v Commissioner of State Revenue (Victoria)* (1996) 186 CLR 630 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2010-2011 (2010) pp 26-27.

[110] See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424 (Brennan CJ), 438-439 (Dawson, Toohey and Gaudron JJ).

[111] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424 (Brennan CJ), 438-439 (Dawson, Toohey and Gaudron JJ). See also the progenitors of this conception: *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 378 (Dixon CJ); *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 528 (Dixon J); *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 682 (Dixon CJ).

[112] The majority adopted a similar approach: See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 426-427 (Brennan CJ), 432-447 (Dawson, Toohey and Gaudron JJ). Perhaps, however, the matter remains uncertain and the caution relevant: 'Where the line for the limit of Commonwealth immunity, if any, is to be drawn comes down to one's perception of the nature of federalism and the principles by which the Australian Federation is to be shaped. The doctrines of the implied immunity of instrumentalities, reserved state powers, implied limits on Commonwealth and, perhaps, state legislative power, together with the doctrine of Commonwealth immunity from state laws are all necessarily linked. The implications to be drawn from each of these doctrines and the emphasis to be given to the principles underlying them will almost inevitably differ amongst members of the High Court for years to come': Igor Mescher, 'Wither Commonwealth Immunity?' (1998) 17 *Australian Bar Review* 23 at 41.

> though it is not confined to specific heads or subjects and though it is a plenary power so long as it has a relevant nexus to the State, is subject to the limitations or restrictions which are found expressly or impliedly in the *Constitution*. When a legislative power is limited or restricted, a somewhat different approach must be taken to the characterisation of a law … the approach is to construe the law and thereby to ascertain what rights, duties, powers or privileges the law creates or affects and, by reference solely to the operation of the law thus ascertained, to see whether it is a law 'with respect to' one or more of the heads of power enumerated in that section. The focus of attention is on the text of the law. But when a limitation or restriction on power is relied on to invalidate the law, the focus of attention is on the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – as well as to its terms in order to ensure that the limitation or restriction is not flouted by mere drafting devices … However, there is no reason why the Crown in right of the Commonwealth should not be bound by a State law of general application which governs transactions into which the Crown in right of the Commonwealth may choose to enter. The executive power of the Commonwealth, exercised by its choice to enter the transaction, is not affected merely because the incidents of the transaction are prescribed by a State law.[113]

Unfortunately, the judgments in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* probably confound the ambiguity from the earlier decisions like *Commonwealth v Cigamatic Pty Ltd (in liq)*, so that it is now difficult to say when or whether a State laws will bind the Commonwealth, other than that there is 'some' Commonwealth immunity. The significance, however, is recognition that there is a substantial body of law that does not bind the Commonwealth.

2.4 Commonwealth expansionism through new governmental bodies

The range of bodies and agreements between the Commonwealth, States and Territories about their roles and responsibilities in delivering government has also expanded the authority of the Commonwealth,[114] particularly with the Commonwealth's control over fiscal resources.[115] Also important has been the High Court's recognition of a 'nationhood' power, perhaps best articulated by Justice Mason in *Victoria v Commonwealth and Hayden*:[116]

> So far it has not been suggested that the implied powers extend beyond the area of internal security and protection of the State against disaffection and subversion.[117] But in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation *and which cannot otherwise be carried on for the benefit of the nation* (emphasis added).[118]

This power combined with the expansive operation of the *Constitution* ss 51(xxxix) and 61 provides a very wide ambit for new governmental bodies. This was well illustrated in *Davis v Commonwealth*.[119] In that case, the Australian Bicentennial Authority, a company incorporated in the Australian Capital Territory, was empowered by the *Australian Bicentennial Authority Act 1980* (Cth) to exclusive use of certain words, signs and symbols[120] as part of a scheme to promote and protect the Bicentennial celebration of the first European settlement in Australia.[121] The plaintiffs produced clothing items using some of the prescribed words, signs and symbols.[122] The plaintiffs sought the Authority's

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[113] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 426-427 (Brennan CJ).
[114] Notably, the Commonwealth has sought to unilaterally exercise power over State responsibilities without State involvement: see Andrew Parkin and Geoff Anderson, 'The Howard Government, Regulatory Federalism and the Transformation of Commonwealth-State Relations' (2007) 42 *Australian Journal of Political Science* 295 at 306-308.
[115] For a recent analysis see Andrew Parkin and Geoff Anderson, 'The Howard Government, Regulatory Federalism and the Transformation of Commonwealth-State Relations' (2007) 42 *Australian Journal of Political Science* 295; Scott Guy, 'Overcoming the Institutional and Constitutional Constraints of Australian Federalism: Developing a New Social Democratic Approach to the Federal Framework' (2006) 34 *Federal Law Review* 319. See also Cheryl Saunders 'The Development of the Commonwealth Spending Power' (1978) 11 *Melbourne University Law Review* 369.
[116] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 178 (Heydon J).
[117] This referring to *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 187-188 (Dixon J).
[118] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J).
[119] *Davis v Commonwealth* (1988) 166 CLR 79 ().
[120] *Davis v Commonwealth* (1988) 166 CLR 79 at 89-91 (Mason CJ, Deane and Gaudron JJ).
[121] *Davis v Commonwealth* (1988) 166 CLR 79 at 88 (Mason CJ, Deane and Gaudron JJ).
[122] *Davis v Commonwealth* (1988) 166 CLR 79 at 91 (Mason CJ, Deane and Gaudron JJ), 104 (Brennan J).

permission to use some of the prescribed words, signs and symbols and this was refused.[123] The plaintiffs then asserted that various provisions addressing the Bicentennial celebration were ultra vires the *Constitution*'s executive powers and also sought an order from the court that various provisions of the *Australian Bicentennial Authority Act 1980* (Cth) were beyond the *Constitution*'s legislating powers.[124] For present purposes, however, it is that the Australian Bicentennial Authority was an intergovernmental body set up for the purposes of celebrating the bicentenary. That this was a valid exercise of the *Constitution* ss 51(xxxix) and 61 powers was not doubted by either the parties or the High Court.[125] Thus:

> From the conclusion that the commemoration of the Bicentenary falls squarely within Commonwealth executive power other consequences follow. The first is that the executive power extends to the incorporation of a company as a means for carrying out and implementing a plan or programme for the commemoration. There is no constitutional bar to the setting up of a corporate authority to achieve this object or purpose in preference to executive action through a Ministry of the Crown. Certainly there is no such bar to the incorporation of a company in the Australian Capital Territory, though we very much doubt that this procedure would enable the Commonwealth to circumvent limitations or restrictions which would otherwise attach to the federal executive power in so far as it extends to the commemoration of the Bicentenary … Section 51(xxxix) of the *Constitution* enables the Parliament to legislate in aid of an exercise of the executive power. So, once it is accepted that the executive power extends to the incorporation of the Authority with the object set out in cl. 3 of its memorandum of association, s. 51(xxxix) authorizes legislation regulating the administration and procedures of the Authority and conferring on it such powers and protection as may be appropriate to such an authority.[126]

A point of qualification might be important in addressing the 'nationhood' power. After *Pape v Commissioner of Taxation* there are more subtle arguments about the nature of the 'nationhood' power (see ¶5.4.3),[127] but the justices in *Davis v Commonwealth* specifically relied on finding that celebrating the bicentenary was valid within the *Constitution* ss 51(xxxix) and 61 powers and that establishing the governmental body was therefore a valid exercise of the incidental power.[128] It was only Chief Justice Mason and Justices Deane and Gaudron that considered that the required legislative power might 'be deduced from the nature and status of the Commonwealth as a national polity'.[129] The other justices were no so explicit.[130]

While many of the arrangements between the Commonwealth, States and Territories remain informal, an increasing number of these arrangements are being formalised through written agreements and legislation.[131] These formal arrangements range from the referral of State legislative powers to the Commonwealth,[132] to various the cooperative legislative schemes[133] and to the less

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123 *Davis v Commonwealth* (1988) 166 CLR 79 at 91 (Mason CJ, Deane and Gaudron JJ), 104-105 (Brennan J).
124 *Davis v Commonwealth* (1988) 166 CLR 79 at 92 (Mason CJ, Deane and Gaudron JJ), 105 (Brennan J).
125 *Davis v Commonwealth* (1988) 166 CLR 79 at 94-95 (Mason CJ, Deane and Gaudron JJ), 104 (Wilson and Dawson JJ), 113-114 (Brennan J), 119 (Toohey J).
126 *Davis v Commonwealth* (1988) 166 CLR 79 at 94-95 (Mason CJ, Deane and Gaudron JJ).
127 Compare *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 62-64 (French CJ), 89-92 (Gummow, Crennan and Bell JJ), 124 (Hayne and Kiefel JJ).
128 See *Davis v Commonwealth* (1988) 166 CLR 79 at 94-95 (Mason CJ, Deane and Gaudron JJ), 104 (Wilson and Deane JJ), 113-114 (Brennan J), 119 (Toohey J).
129 *Davis v Commonwealth* (1988) 166 CLR 79 at 95 (Mason CJ, Deane and Gaudron JJ) citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 187-188 (Dixon J).
130 See *Davis v Commonwealth* (1988) 166 CLR 79 at 104 (Wilson and Dawson JJ), 113 (Brennan J), 119 (Toohey J).
131 See, for examples, Andrew Parkin and Geoff Anderson, 'The Howard Government, Regulatory Federalism and the Transformation of Commonwealth-State Relations' (2007) 42 *Australian Journal of Political Science* 295; Martin Painter, 'Multi-Level Governance and the Emergence of Collaborative Federal Institutions in Australia' (2001) 29 *Policy and Politics* 137.
132 *Constitution* s 51(xxxvii). Notably the States can continue to legislate subject to the *Constitution* s 109: *Graham v Paterson* (1950) 81 CLR 1 at 18-20 (Latham CJ), 21-22 (McTiernan J), 24-25 (Williams J), 25 (Webb J), 26 (Fullagar J). And the revocability of unlimited referrals remains unresolved: see *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 224-226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and

formal networks of administrative arrangements.[134] Perhaps the pre-eminent of these formal arrangements between the Commonwealth, States and Territories is now the Council of Australian Governments (COAG) as the peak inter-governmental forum, and the range of agreements and bodies that have evolved under its auspices:[135] 'COAG is particularly significant for the governance of the Australian federation because it has simultaneously reinforced cooperation between the Commonwealth and the States [and Territories], while at the same time embedding the conditional nature of the federal relationship'.[136] Other significant Executive level Commonwealth, State and Territory inter-governmental bodies now include:[137]

(a) *Premiers' Conference* – Historically the annual Premiers' Conference focussed on the level and distribution among States and Territories of general revenue assistance.[138] With the adoption of the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*[139] and the *Intergovernmental Agreement on Federal Financial Relations*,[140] and the establishing of the Ministerial Council for Federal Financial Relations,[141] there are now annual meetings addressing the financial needs and wants of the States and Territories.[142] Premiers' Conferences remain as a possible forum to address issues between the Commonwealth, States and Territories, albeit they are no longer an annual affair.[143]

(b) *Australian Loan Council* – The Australian Loan Council is a Commonwealth-State Ministerial Council implementing the borrowing arrangements according to the *Financial Agreement Act 1994* (Cth) and the *Financial Agreement* addressing Commonwealth and State public sector

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Owen JJ); *Airlines of New South Wales Pty Ltd v New South Wales* (1964) 113 CLR 1 at 38 (Taylor J), 52-53 (Windeyer J). See also Robert French, 'The Referral of State Powers' (2003) 31 *University of Western Australia Law Review* 19 at 31-34.

133 See, for example, Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (2006) pp 69-76. See, for examples, *R v Hughes* (2000) 202 CLR 535 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne, Callinan JJ); *Bond v The Queen* (2000) 201 CLR 213 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Re Wakim; Exparte McNally* (1999) 198 CLR 511 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Byrnes v The Queen* (1999) 199 CLR 1 (Gaudron, McHugh, Gummow, Kirby and Callinan JJ); *New South Wales v Commonwealth* (1990) 169 CLR 482 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 (Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ).

134 See Brian Galligan, Owen Hughes and Cliff Walsh, 'Perspectives and Issues' in Brian Galligan, Owen Hughes and Cliff Walsh (eds), *Intergovernmental Relations and Public Policy* (1991) pp 3-20 and the references there.

135 Most recently this has included the CoAG Reform Council: see CoAG Reform Council, *Charter* (2010). See also Andrew Parkin and Geoff Anderson, 'The Howard Government, Regulatory Federalism and the Transformation of Commonwealth-State Relations' (2007) 42 *Australian Journal of Political Science* 295; Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (1998) pp 32-91.

136 Geoff Anderson, 'The Council of Australian Governments: A New Institution of Governance for Australia's Conditional Federalism' (2008) 31 *University of New South Wales Law Journal* 493 at 495. For an overview of the CoAG developments in the context of 'regulatory federalism' see also Andrew Parkin and Geoff Anderson, 'The Howard Government, Regulatory Federalism and the Transformation of Commonwealth-State Relations' (2007) 42 *Australian Journal of Political Science* 295. More generally see Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Reforming our Constitution: A Roundtable Discussion* (2008) pp 33-46.

137 For an earlier audit see, for example, Council of Australian Governments, *Review of Ministerial Councils* (1993). See also Advisory Council for Inter-governmental Relations, *Compendium of Intergovernmental Agreements* (1986); Advisory Council for Inter-governmental Relations, *Register of Commonwealth-State Co-operative Arrangements* (1984).

138 See Campbell Sharman, 'Executive Federalism' in Brian Galligan, Owen Hughes and Cliff Walsh (eds), *Intergovernmental Relations and Public Policy* (1991) pp 26-28.

139 See *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth) s 10 and sch 2.

140 Council of Australian Governments, *Communiqué*, 29 November 2008.

141 See Council of Australian Governments, *Communiqué*, 29 November 2008. See also Council of Australian Governments, *Commonwealth-State Ministerial Councils Compendium* (2009) p 11; Department of Finance and Deregulation, *List of Australian Government Bodies and Governance Relationships*, Financial Management Reference Materials No 1 (3rd ed, 2009) p 580.

142 See Department of the Treasury, *Annual Report 2007-2008* (2008) p 55. See also Council of Australian Governments, *Commonwealth-State Ministerial Councils Compendium* (2009) p 28.

143 Council of Australian Governments, *Commonwealth-State Ministerial Councils Compendium* (2009) p 11.

borrowings,[144] The Loan Council meets annually to consider each jurisdiction's expected borrowing for the next financial year.[145] While the Commonwealth used to have a significant role in State borrowing,[146] this role has now subsided:

> Current Loan Council arrangements operate on a voluntary basis and emphasise transparency of public sector financing rather than adherence to strict borrowing limits. These arrangements are designed to enhance financial market scrutiny of public sector borrowing and facilitate informed judgments about each government's financial performance.[147]

In recent times the role of the Loans Council has been enhanced as an adviser to the Commonwealth about the macroeconomic implications of expenditure from the Building Australia Fund,[148] the Education Investment Fund,[149] and the Health and Hospitals Fund,[150] and about the Commonwealth's guarantee of State borrowings.[151]

(c) *Treaties Council* – In 1996 COAG 'agreed to the establishment of a Treaties Council and related improvements to the provision of information about, and consultation procedures concerning, treaties and other international instruments of sensitivity or importance to the States and Territories'.[152] COAG then adopted the *Principles and Procedures for Commonwealth-State Consultation on Treaties*.[153] The subsequent meeting of the Treaties Council considered a range of treaties.[154] The Treaties Council has not met again.[155]

Under the COAG auspices (and the oversight of the COAG Reform Council) there are a plethora of other Ministerial Councils[156] and various agreements comprising intergovernmental agreements, National Agreements, National Partnerships and Water Management Partnerships.[157]

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144 See *Constitution* s 105A; *Financial Agreement Act 1994* (Cth) s 4 and sch; *Financial Agreement Validation Act 1929* (Cth) s 2 and sch. For an overview see Richard Webb, *The Australian Loan Council*, Parliamentary Library Research Note No 43 (2002); Denis James, 'Federal-State Financial Relations: The Deakin Prophecy' in Geoffrey Lindell and Robert Bennett, *Parliament: The Vision in Hindsight* (2001) pp 210-248; Denis James, *The Australian Loan Council*, Parliamentary Library Background Paper No 29 (2nd ed, 1993); Cheryl Saunders, 'Government Borrowing in Australia' (1989) 17 *Melbourne University Law Review* 187.

145 See Department of the Treasury, *Annual Report 2007-2008* (2008) p 55. See also Council of Australian Governments, *Commonwealth-State Ministerial Councils Compendium* (2009) p 12.

146 See Denis James, 'Federal-State Financial Relations: The Deakin Prophecy' in Geoffrey Lindell and Robert Bennett, *Parliament: The Vision in Hindsight* (2001) pp 243-246; Denis James, *The Australian Loan Council*, Parliamentary Library Background Paper No 29 (2nd ed, 1993).

147 Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2009-2010 (2009) p 156.

148 Established by the *Nation-building Funds Act 2008* (Cth) s 12(1) and consisting of the Building Australia Fund Special Account (s 13(1)) and the investments of the Building Australia Fund (s 32(1)).

149 Established by the *Nation-building Funds Act 2008* (Cth) s 131(1) and consisting of the Education Investment Fund Special Account (s 132(1)) and the investments of the Education Investment Fund (s 151(1)).

150 Established by the *Nation-building Funds Act 2008* (Cth) s 214(1) and consisting of the Health and Hospitals Fund Special Account (s 215(1)) and the investments of the Health and Hospitals Fund (s 227(1)).

151 See Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2009-2010 (2009) pp 156-158; Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2008-2009 (2008) pp 18 and 85-86.

152 Council of Australian Governments, *Communiqué*, 14 June 1996.

153 Council of Australian Governments, *Communiqué*, 14 June 1996, Attachment C.

154 See Treaties Council, *Communiqué*, 7 November 1997.

155 See Council of Australian Governments, *Commonwealth-State Ministerial Councils Compendium* (2009) p 10.

156 These include: Ministerial Council for Aboriginal and Torres Strait Islander Affairs, Ministerial Council on the Administration of Justice, Ministerial Council for Police and Emergency Management – Police, Ministerial Council for Police and Emergency Management – Emergency Management, Intergovernmental Committee of the Australian Crime Commission, Corrective Services Ministers' Conference, Ministerial Conference on Ageing, Ministerial Council of Attorneys-General, Standing Committee of Attorneys-General, Ministerial Council for Corporations, Ministerial Council for Federal Financial Relations, Commonwealth, State, Territory and New Zealand Ministers' Conference on the Status of Women, Ministerial Council on Consumer Affairs, Cultural Ministers Council, Ministerial Council on Drug Strategy, Ministerial Council on Education, Employment, Training and Youth Affairs, Ministerial Council on Energy, Environment Protection and Heritage Council, Ministerial Council on Gambling, Gene Technology Ministerial Council,

There appear, however, to be some constraints on the Commonwealth exercising the States' executive powers. As a generalisation, inter-governmental schemes are operated by the Commonwealth making an Intergovernmental Agreement (or the like), and then the Commonwealth Parliament's passing a law according to the broad Territory power in the *Constitution* s 122 that is then adopted by the States with mirror legislation.[158] The limits of these kinds of arrangements are illustrated by *R v Hughes* where the *Director of Public Prosecutions Act 1983* (Cth) empowered the Commonwealth Director of Public Prosecutions (DPP) to institute and prosecute offences against the laws of the Commonwealth in his official name.[159] The *Corporations (Western Australia) Act 1990* (WA) then provided that the *Director of Public Prosecutions Act 1983* (Cth) applied as a law of Western Australia for offences against the *Corporations (Western Australia) Act 1990* (WA) as if they were laws of the Commonwealth.[160] The basic scheme under the *Corporations (Western Australia) Act 1990* (WA) was that the Commonwealth had passed a law according to its Territory powers and the States and other Territories then passed a law adopting those arrangements.[161] The particular circumstances were that Hughes had been indicted for alleged breaches of the *Corporations (Western Australia) Act 1990* (WA) making investments in the United States and was being prosecuted by the DPP according to the *Director of Public Prosecutions Act 1983* (Cth).[162] Hughes contended that there was not the necessary legislative authority under Commonwealth and State law for the DPP to prosecute the alleged breaches of the State *Corporations (Western Australia) Act 1990* (WA).[163] On the facts in this particular case the High Court found that the charges related to matters within the legislating power of the Commonwealth and so there was the necessary legislative power for the DPP to prosecute the alleged breaches of the *Corporations (Western Australia) Act 1990* (WA).[164] In other words, the High Court decided that the particular prosecutions were within the power of the *Constitution* ss 51(i) and (xxix) and so valid, but did not decide whether such prosecutions would have been valid if outside the powers set out in the *Constitution*.[165] Significantly though, Justice Kirby stated:

Health, Community and Disability Services Ministerial Council, Australian Health Ministers' Conference, Community and Disability Services Ministers' Conference, Australia and New Zealand Food Regulation Ministerial Council, Housing Ministers' Conference, Ministerial Council on Immigration and Multicultural Affairs, Ministerial Council on International Trade, Local Government and Planning Ministers' Council, Ministerial Council on Mineral and Petroleum Resources, Natural Resource Management Ministerial Council, Online and Communications Council, Primary Industries Ministerial Council, Australian Procurement and Construction Council, Regional Development Council, Small Business Ministerial Council, Sport and Recreation Ministers' Council, Tourism Ministers' Council, Australian Transport Council, Ministerial Council for Vocational and Technical Education, Workplace Relations Ministers' Council, Great Barrier Reef Ministerial Council, Murray-Darling Basin Ministerial Council, Wet Tropics Ministerial Council: Council of Australian Governments, *Commonwealth-State Ministerial Councils Compendium* (2009) pp 14-89. See also Department of Finance and Deregulation, *List of Australian Government Bodies and Governance Relationships*, Financial Management Reference Materials No 1 (3rd ed, 2009).

157 See CoAG Reform Council, *Charter* (2010) pp 3-4.

158 For an example on some of the problems consider the development of a national Corporations Law: see, for example, Dennis Rose and Geoffrey Lindell, 'A Constitutional Perspective on Hughes and the referral of Powers' (2000) 11 3 *Constitutional Law and Policy Review* 21. For a list of schemes see *R v Hughes* (2000) 202 CLR 535 at 580 (Kirby J).

159 *R v Hughes* (2000) 202 CLR 535 at 545 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

160 *R v Hughes* (2000) 202 CLR 535 at 546 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 581-582 (Kirby J). For a case considering State officials empowered by Commonwealth laws: see *O'Donoghue v Ireland* (2008) 234 CLR 599 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

161 *R v Hughes* (2000) 202 CLR 535 at 544 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 564-565. See also *Gould v Brown* (1998) 193 CLR 346 at 393-394 (Gaudron J), 413-415 (McHugh J), 433-437 (Gummow J).

162 *R v Hughes* (2000) 202 CLR 535 at 545 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

163 *R v Hughes* (2000) 202 CLR 535 at 546 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 559-560 and 582 (Kirby J).

164 *R v Hughes* (2000) 202 CLR 535 at 556-557 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 583 (Kirby J).

165 See Dennis Rose, 'Commonwealth-State Co-operative Schemes after Hughes: What Should be Done Now?' (2002) 76 *Australian Law Journal* 631 at 632.

> The national importance of the legislation under scrutiny, the way in which it attempts to achieve its objectives by co-operation amongst the constituent governments of the Commonwealth and the presumption that such co-operation is an elemental feature of the federal system of government which the *Constitution* establishes, make it appropriate to approach this matter in a way that gives the *Constitution* and the legislation in question, to the full extent that their language and structure allow, an operation that is rational, harmonious and efficient. This Court should be the upholder, and not the destroyer, of lawful co-operation between the organs of government in all of the constituent parts into which the Commonwealth of Australia is divided. No other approach is appropriate to the interpretation of the basic law of the 'indissoluble Federal Commonwealth' upon which the people of Australia agreed when the *Constitution* was adopted and which they are taken to accept for their governance today (footnotes omitted).[166]

Despite the arrangement challenged in *R v Hughes* being held to be valid, the validity of other co-operative schemes and activities outside the powers set out in the *Constitution* remains contentious,[167] and probably can only finally be resolved through appropriate referral of the relevant powers.[168] Significantly, however, there is recognition by the High Court of a pro-federalism approach to such schemes that, in their application, are limiting State powers.

2.5 The 'new' Federalism

As a counter to the concerns about Commonwealth expansionism (and the multitude of other criticisms) there is an ongoing discussion about 'new' Federalism. At a superficial level the *Constitution* and its application reflect 'Federalism' as a compact entered into between the Colonies for the sharing of the limited powers of government between the Commonwealth and the new States (and Territories).[169] This conception of sharing powers was derived from the United States,[170] so that the division of powers between the Commonwealth and State governments established the autonomy of each element to exercise their assigned powers.[171] The concerns about 'Federalism' in

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166 *R v Hughes* (2000) 202 CLR 535 at 560-561 (Kirby J).

167 See, for example, *O'Donoghue v Ireland* (2008) 234 CLR 599 at 619 (Gleeson CJ), 629-630 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ) holding that State magistrates were validly empowered by the *Extradition Act 1988* (Cth) to conduct extradition eligibility proceedings under the *Crimes Act 1914* (Cth). There the applicant asserted 'that the Parliament of the Commonwealth lacks the power, without State legislative approval, to impose upon the holder of a State statutory office an administrative duty enforceable by legal remedy where the functions and incidents of that office are "exhaustively" defined by State legislation' (at 622). Justice Kirby in dissent noted that: 'The point upon which I differ from the other members of the Court derives from the federal idea. It is not consistent with that idea, as expressed in the Australian Constitution, for the Federal Parliament, still less the federal Government, to impose federal administrative functions on State magistrates, distinct from the functions provided for by State law. As senior State office-holders, such magistrates cannot have duties imposed on them unilaterally by federal legislation. Any resulting gap in their legal authority cannot be filled by State Government consent. At least, that cannot be done unless the State Parliament so provides with sufficient clarity' (at 630). See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

168 See, for example, Robert French, 'The Referral of State Powers' (2003) 31 *University of Western Australia Law Review* 19. See also Andrew Lynch and George Williams, 'Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible' (2008) 31 *University of New South Wales Law Journal* 395 at 414-421; Dennis Rose, 'Commonwealth-State Co-operative Schemes after Hughes: What Should be Done Now?' (2002) 76 *Australian Law Journal* 631.

169 See generally Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (2009); Federal-State Relations Committee, Parliament of Victoria, *Australian Federalism: The Role of the States*, Second Report (1998).

170 See, for example, Brian Galligan, *Parliament's Development of Federalism*, Parliamentary Library Research Paper No 26 (2001) pp 6-8 and the references therein. But there is a broader 'Australian appropriation': see Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (2009) pp 67-133 and the references therein.

171 The definition of 'federalism' remains contested and might better be considered according to its principles: see Geoffrey Sawer, *Modern Federalism* (1969) p 179. Notably, the High Court has stated: '[a]s was held in [*Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82 (Dixon J)]: "The foundation of the *Constitution* is the conception of a central government and a number of State governments separately organised. The *Constitution* predicates their continued existence as independent entities." And because the entities, whose continued existence is predicated by the *Constitution*, are polities, they are to continue as separate bodies politic each having legislative, executive and judicial functions. But this last observation does not identify the content of any of those functions': *New South Wales v Commonwealth* (2006) 229 CLR 1 at 120 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also George Winterton, *Parliament, The*

Australia include that it is unequal, inefficient (involving a lot of duplication), creates competition between the elements, avoids dealing with 'national' requirements, creates policy vacuums and divides responsibilities, and so on.[172] In the context of the Executive the particular concerns are that the federal institutions adopted from the United States were then imposed on the representative and responsible government of the Westminster model adopted from the United Kingdom:[173]

> … it is contended that the introduction of the Cabinet system of Responsible Government into a Federation in which the relations of the two branches of the legislature, having equal and coordinate authority, are quite different from those existing in a single autonomous State, is repugnant to the spirit and intention of a scheme of Federal Government. In the end it is predicted that either Responsible Government will kill the Federation and change it into a unified State, or the Federation will kill Responsible Government and substitute a new form of Executive more compatible with the Federal theory … There can be no doubt that it will promote the concentration of Executive control in the House of Representatives.[174]

The other concern in the context of the Executive is that by denying sovereignty to a particular parliament, Federalism diffuses ministerial responsibility.[175] The ongoing discussion of 'Federalism' inevitably addresses reviewing the federal compact and how that compact might be modified (or abolished) to address the various flaws:[176]

> There is a general consensus … that the Australian federal system does not work as well as it might. The question for the nine governments is: what should be done to enhance its performance and its reputation? The way forward is far from clear, particularly as any move to wholesale change will inevitably become enmeshed in party politics. It has been forever thus.[177]

Despite the ongoing discussion about a host of different remedial measures to 'fix' the Federation, the discussions are essentially now sterile and unproductive, albeit they are enthusiastically promoted. Perhaps they will deliver something concrete with the shivering echoes of referendums to amend the *Constitution*. In the meantime, cooperation between the different parts of the federation and creatively managing within the confines of the *Constitution* are the practicality.

Executive and the Governor-General: A Constitutional Analysis (1983) p 1; John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 380-383.

[172] There is a huge literature outlining a plethora of complaints and alternative arrangements leaving open the question of how federalism might be improved: see, as generalising examples, Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Reforming our Constitution: A Roundtable Discussion* (2008) pp 33-46; James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245; Scott Bennett, *The Politics of the Australian Federal System*, Parliamentary Library Research Brief No 4 (2006).

[173] See Robert Parker, 'Responsible Government in Australia' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) p 17; Brian Galligan, 'The Founders' Design and Intentions Regarding Responsible Government' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) pp 2-9.

[174] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 706-707.

[175] Robert Parker, 'Responsible Government in Australia' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) pp 11-12.

[176] See also Andrew Lynch and George Williams, 'Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible' (2008) 31 *University of New South Wales Law Journal* 395; AJ Brown, 'In Pursuit of the Genuine Partnership: Local Government and Federal Constitutional Reform in Australia' (2008) 31 *University of New South Wales Law Journal* 435; Anne Twomey, 'Reforming Australia's Federal System' (2008) 36 *Federal Law Review* 57; Anne Twomey and Glenn Withers, *Australia's Federal Future: Delivering Growth and Prosperity*, A Report for the Council for the Australian Federation (2007); and so on.

[177] Scott Bennett, *The Politics of the Australian Federal System*, Parliamentary Library Research Brief No 4 (2006) p 29.

3. The 'executive' concepts

3.1 Introduction

The *Constitution*'s text and structure do not set out what is meant by 'executive power' leaving it as a hazy constitutional concept of a capacity of the government and its institutions and personalities to act – 'the authority within the State which administers the law, carries on the business of government and maintains order within and security from without the State'.[1] As a consequence many of the basic concepts that now underpin the modern exercise of this executive power must effectively be 'divined'. A great body of constitutional law has now evolved to demarcate the various powers of the Commonwealth under the *Constitution*, including the 'executive power', and set the boundaries of co-existing State (and Territory) and Commonwealth powers.[2] The result is that the exercise of powers by and under the *Constitution* is founded within a matrix of theoretical moments, approaches and legalities, and an ongoing evolutionary experiment in the exercise of governmental powers.

The purpose of this chapter is to address some of the key concepts that underpin the Australian democratic experiment associated with 'executive power'. And a fundamental part of appreciating this Australian democratic experiment is the general proposition about the 'rule of law' and the tension in the *Constitution* reflecting its founding influences from the United States heralding the 'separation of powers', and from Britain heralding 'responsible government' (and 'representative democracy').[3] The intention in this chapter is that this analysis will provide a foundation for appreciating and understanding the assertion of executive power by and under the *Constitution* addressed in the remaining parts of this book. The extensive survey of 'responsible government' and 'representative government (or democracy)' is important in that it illustrates the limitations to ideals about absolute accountability, responsibility and transparency through the election of Parliament and the incidental election of the heads of the Executive as a consequence of the majority of the House of Representatives. The various High Court decisions show that the conception of 'responsible government' is a matter of continued debate and dynamic evolution. Meanwhile 'representative government (or democracy)' has enabled the Parliament (and the majority in the House of Representatives) to influence, in perhaps significant ways, the means of representation, and indirectly, the standard (and ethics) of those elected to represent and maintain the 'responsible government'. The most important reason for presenting this analysis of the 'rule of law', the 'separation of powers', 'responsible government' and 'representative government (or democracy)' is to show that the Executive is constrained by concepts not detailed in the *Constitution*, but rather 'divined'. This is to allude to the concern that these concepts, while they may be promoted as rigorous constitutional limits delivering accountability, responsibility and transparency, do not fulfil that function as might be expected. Put simply, these concepts are not settled, but rather evolving, mutable and often verging on mere platitudes, albeit they capture central aspirations for constitutional governmental powers and confer an air of legitimacy to governmental actions.

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[1] William Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed, 1976) p 385.

[2] A further problem arises in distinguishing between the overlapping laws, and working out which Commonwealth laws apply to the States, and vice versa. Thus 'where by the one *Constitution* separate and exclusive governmental powers have been allotted to two distinct organisms, neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the *capacity* or *functions* expressly conferred on the other': *Pirrie v McFarlane* (1925) 36 CLR 170 at 191 (Isaacs J) (albeit this contention and the resolution to this particular contention remains unresolved: see, for a recent example, *Austin v Commonwealth* (2003) 215 CLR 185 at 211-222 (Gleeson CJ), 245-267 (Gaudron, Gummow and Hayne JJ), 276-285 (McHugh J), 296-308 and 311-313 (Kirby J)).

[3] Perhaps reflecting on the irony that a key moment was Frenchman Charles de Montesquieu's visits to England and his description of the English ideal of liberty through organised social conflict and government by the 'separation of powers': see Charles de Montesquieu, *The Spirit of the Laws* (translated and edited by Anne Cohler, Basia Miller, Harold Stone, 1989) pp 15-19.

3.2 The 'rule of law'

The 'rule of law' formed part of the unwritten British Constitution that was famously 'formulated' (or rather an attempt was made to articulate) by Professor Albert Venn Dicey in the late 1800s.[4] According to that formulation, the 'rule of law' has three aspects:

(a) '… it means the absolute supremacy or predominance of the rule of law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, or prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and law alone; a man may be punished for a breach of the law but he can be punished for nothing else'.[5] A similar conception has been adopted and applied in Australia.[6]

(b) '… it means equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the rule of law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals'.[7]

(c) '… may be used as a formula for expressing the fact that with us the law of the Constitution, the rules which in foreign countries naturally form part of the constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the courts, that, in short, the principles of private law have with us been by the actions of the courts and Parliament so extended as to determine the position of the Crown and of its servants, thus the Constitution is a result of the ordinary law of the land'.[8]

Dicey's formulation has been subject to substantial criticism.[9] His formulation probably does, however, capture the essence of at least part of the modern conception of the 'rule of law' that government action must be permitted or authorised by law,[10] and this has been favourably adopted by the High Court.[11] In short, the 'rule of law' is the 'supremacy of law, over naked power and

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[4] See Harold Renfree, *The Executive Power of the Commonwealth of Australia* (1984) pp 4-5.

[5] Albert Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1965) p 202.

[6] See, for example, *Arthur Yates and Co Pty Ltd v The Vegetable Seeds Committee* (1945) 72 CLR 37 at 66 (Latham CJ) setting out another similar formulation: 'what is done officially must be done in accordance with the law'.

[7] Albert Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1965) pp 202-203.

[8] Albert Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1965) p 203.

[9] See, for example, *Sue v Hill* (1999) 199 CLR 462 at 492 (Gleeson CJ, Gummow and Hayne JJ). See also Naomi Sidebotham, 'Shaking the Foundations: Dicey, Fig Leaves and Judicial Review' (2001) 8 *Australian Journal of Administrative Law* 89; Andrew Sykes, 'The "Rule Of Law" as an Australian Constitutionalist Promise' (2002) 9 *Murdoch University Electronic Journal of Law* at [7]-[14]; David Kinley, 'Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law' (1994) 22 *Federal Law Review* 194; H Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 170 *Osgoode Hall Law Journal* 1. But see generally Geoffrey de Q Walker, *The Rule of Law: Foundations of a Constitutional Democracy* (1988).

[10] Perhaps stated more succinctly as a protection against the exercise of arbitrary power: 'But *Freedom of Men under Government*, is, to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it; A Liberty to follow my own Will in all things, where that Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man': John Locke, 'The Second Treatise of Civil Government', in Peter Laslett (ed), *John Locke: Two Treatise of Government* (2005) p 284. See also Simon Evans, 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Public Law Review* 94 at 94-96.

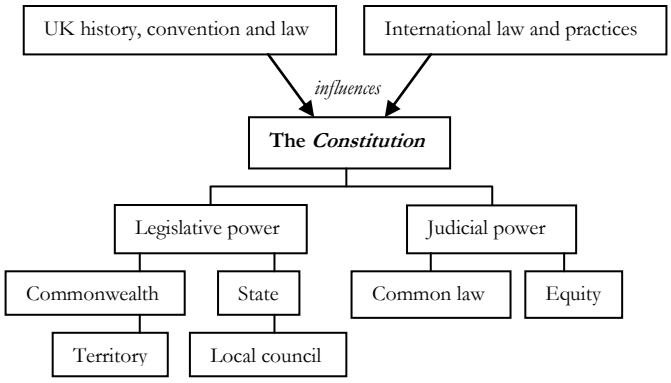
[11] That the 'rule of law' forms 'an assumption' under the *Constitution*: see *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J). See also, for some of the many examples, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351-352 (Gleeson CJ and Heydon J), 441 (Kirby J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482-483 and 492 (Gleeson CJ), 513-514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 521-522 (Callinan J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 107-108 (Gaudron and Gummow JJ); *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 (Gaudron J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 381 (Gummow and Hayne JJ); *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 196 (McHugh J); *Walker v New South Wales* (1994) 182 CLR 45 at 49-50 (Mason CJ); *A v Hayden* (1984) 156 CLR 532 at 540 (Gibbs CJ), 559-561 (Mason J), 562 (Murphy J), 571 (Wilson and Dawson JJ), 588-589 (Brennan J), 595-596 (Deane J); *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70 (Brennan J); and so on. See also Murray Gleeson, *The Rule of Law and the Constitution* (2000); Victor Windeyer, 'A Birthright and Inheritance: The Establishment of the Rule of Law

unbridled discretion'.[12] Importantly, it is *both* the power and repository of power that must be permitted or authorised by law:

> An act done in purported exercise of a statutory power is valid if the act falls within the statutory provision which confers the power. Prima facie an act will not fall within the statute unless it be done by the person in whom the statute reposes the power ... Validity is thus dependent upon the identity of the authority and the doer of the act.[13]

In addition to this basic principle, the modern 'rule of law' will almost certainly recognise qualitative requirements to the exercise of government authority,[14] such as a minimum standard of procedural fairness (particularly in criminal matters, such as a presumption of innocence, and so on),[15] assistance of an independent legal profession in responding to government authority,[16] the protection of basic human rights,[17] and the review of government actions exercising discretions through appeals.[18] Unfortunately, these qualitative requirements mean that the 'rule of law' represents an underpinning of executive power and a constraint on executive power, albeit the boundaries of the concept remain to be determined. Thus, it might be best thought of merely as a constitutional[19] 'assumption'[20] limiting the Executive's exercise of available powers[21] and as a measure of 'accountability',[22] albeit providing a very limited direction to which laws apply and take precedence. Figure 3.1 illustrates the various influences (or qualitative requirements) and the competing rules.

Figure 3.1: The competing 'rules of law'
The 'rule of law' under the *Constitution* and the influences on interpreting and applying the rules and the diversity of competing rules (Commonwealth, State, Territory, Local Council, equity and common law) that result from the authority of the *Constitution*.



in Australia' (1962) 1 *Tasmanian University Law Review* 635. Notably, the application of the 'rule of law' may depend on the particular circumstances: see *Al-Kateb v Godwin* (2004) 219 CLR 562 at 609-611 (Gummow J), 618 (Kirby J).

[12] Keith Mason, 'The Rule of Law' in Paul Finn (ed), *Essays on Law and Government, Volume 1 Principles and Values* (1995) p 114. See also Geoffrey Palmer, *Unbridled Power?* (1979).

[13] *Re Reference Under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86 at 93 (Brennan J) as cited in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 450 (Gummow and Hayne JJ).

[14] See J Spigelman, 'Rule of Law and Enforcement' (2003) 26 *University of NSW Law Journal* 200 at 203. See also Marian Sawer, Norman Abjorensen and Phil Larkin, *Australia: The State of Democracy* (2009) pp 25-27.

[15] See, for examples that illustrate the proposition that presuming innocence is a fundamental rule of law, *Tofilau v The Queen* (2007) 231 CLR 396 at 446 (Kirby J), 487 and 506 (Callinan, Heydon and Crennan JJ); *Krakover v The Queen* (1998) 194 CLR 202 at 224 (McHugh J); *Taikato v The Queen* (1996) 186 CLR 454 at 465-466 (Brennan CJ, Toohey, McHugh and Gummow JJ); *Kingswell v The Queen* (1985) 159 CLR 264 at 299-300 (Deane J); and so on.

[16] For judicial recognition of this proposition: see *Ruddock v Vadarlis* (2001) 110 FCR 491 at 548-549 (French J).

[17] See, for example, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-28 (Brennan, Deane and Dawson JJ), 53 (Gaudron J).

[18] See, for example, *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70-71 (Brennan J).

[19] See *Constitution of the Commonwealth of Australia Act 1900* (UK) s 5.

[20] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J).

[21] See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482-484 and 492 (Gleeson CJ), 513-514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also Elizabeth Carroll, 'Woolworths Ltd v Pallas Newco Pty Ltd: A Case Study in the Application of the Rule of Law in Australia' (2006) 13 *Australian Journal of Administrative Law* 87.

[22] *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 (Gaudron J).

There are a number of High Court decisions that illustrate the limiting contention that the Executive (and Parliament) must act within the scope of powers conferred on the Executive.[23] While a simple proposition, its exercise in practice often requires a balance between competing 'rules of law' and the favouring of some laws over others.

A v Hayden (1984) 156 CLR 532

Thus, in *A v Hayden* the plaintiffs sought an injunction preventing the Commonwealth disclosing their names to the Victoria Police following an allegation of likely criminal conduct.[24] The plaintiffs as Commonwealth employees and others engaged by the Commonwealth had taken part in an Australian Secret Intelligence Service training exercise that involved rescuing a hostage from a room on an upper floor of the Sheraton Hotel in Melbourne.[25] Some of the plaintiffs were provided with guns and blank ammunition and a sledge hammer and during the exercise a door was hammered in and various members of the hotel staff and public were threatened with guns.[26] After the training exercise the Victoria Police sought their identities from the Commonwealth to properly investigate the possible crimes, and the plaintiffs sought to restrain the Commonwealth from disclosing their identities.[27] The High Court was satisfied that as a general proposition the executive had no power to authorize a breach of the law.[28] The complication was, however, that the Commonwealth's employees and various others had a contract or other arrangements with the Commonwealth to keep their identity confidential.[29] The plaintiffs also argued that disclosure of their identity might compromise the national and international security of Australia.[30] The key question was whether the contract bound the Commonwealth so as to aid in obstructing the administration of justice? The High Court decided that in the circumstances the public interest in the administration of justice displaced the arrangements to maintain a confidence.[31]

Chief Justice Gibbs accepted that the contractual terms were valid and that it was for the Commonwealth to establish that 'the failure to disclose the information would tend to obstruct the course of justice and would be contrary to the public interest' before the contractual term was set aside.[32] The available facts suggested that some of the Commonwealth's employees and others may not have committed crimes and in those circumstances disclosure of their identity may not be justified.[33] For the Chief Justice this meant that further evidence was required before the contractual term was determined to be unenforceable.[34] Justice Mason considered that on the basis there were reasonable grounds for suspecting that the plaintiffs had committed crimes then non-disclosure of the names of the participants could have adversely affect the enforcement of the criminal law.[35] The

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[23] See, for example, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482-484 and 492 (Gleeson CJ), 513-514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) and the cases cited therein.

[24] *A v Hayden* (1984) 156 CLR 532 at 539 (Gibbs CJ), 550 (Mason J), 561 (Murphy J), 566 (Wilson and Dawson JJ), 578 (Brennan J), 594 (Deane J).

[25] *A v Hayden* (1984) 156 CLR 532 at 539 (Gibbs CJ), 550 (Mason J), 564 (Wilson and Dawson JJ), 578-579 (Brennan J), 592-594 (Deane J). Elegantly described by Justice Mason: 'There is an air of unreality about this stated case. It has the appearance of a law school moot based on an episode taken from the adventures of Maxwell Smart' (at 550).

[26] *A v Hayden* (1984) 156 CLR 532 at 539-540 (Gibbs CJ) 564-565 (Wilson and Dawson JJ), 579-580 (Brennan J), 593 (Deane J).

[27] *A v Hayden* (1984) 156 CLR 532 at 539 (Gibbs CJ), 561 (Murphy J), 565-570 (Wilson and Dawson JJ), 582-583 (Brennan J), 593-594 (Deane J).

[28] *A v Hayden* (1984) 156 CLR 532 at 540 (Gibbs CJ), 550 (Mason J), 562 (Murphy J), 574 (Wilson and Dawson JJ), 580-581 and 588-589 (Brennan J), 592 (Deane J).

[29] *A v Hayden* (1984) 156 CLR 532 at 540 (Gibbs CJ), 551 (Mason J), 563 (Murphy J), 569-570 (Wilson and Dawson JJ), 583 and 584 (Brennan J), 594 (Deane J).

[30] *A v Hayden* (1984) 156 CLR 532 at 540-541 (Gibbs CJ), 551 (Mason J), 563-564 (Murphy J), 574-575 (Wilson and Dawson JJ), 589 (Brennan J), 597 (Deane J).

[31] *A v Hayden* (1984) 156 CLR 532 at 561 (Mason J), 563 (Murphy J), 574 (Wilson and Dawson JJ), 586 (Brennan J), 596-597 (Deane J).

[32] *A v Hayden* (1984) 156 CLR 532 at 547 (Gibbs CJ).

[33] *A v Hayden* (1984) 156 CLR 532 at 547-548 (Gibbs CJ).

[34] *A v Hayden* (1984) 156 CLR 532 at 549 (Gibbs CJ).

[35] *A v Hayden* (1984) 156 CLR 532 at 561 (Mason J).

result was to accept that the obligation of confidence was not enforceable.[36] Similarly, Justices Wilson and Dawson and Brennan and Deane gave preference to the administration of justice and found the contractual term unenforceable.[37] Justice Murphy also considered that the contractual term was unenforceable because it 'would be contrary to public policy for a Minister or the executive government to be prevented from revealing information which would assist in the investigation of a crime, whether great or less'.[38]

Perhaps significantly, the question of national security was dulled in these proceedings by the passing of legislation in the various jurisdictions to protect the identity of those involved in national and international security.[39] The effect of this legislation was to remove a potentially competing consideration in balancing the public interests in respecting contracts, promoting the enforcement of the criminal law and protecting national and international security. The case does, however, illustrate that there may be competing 'rules of law' and that choices need to be made in balancing the various rules (see Figure 3.1).

Commonwealth v John Fairfax & Sons Limited (1980) 147 CLR 39

Another significant case was the *Commonwealth v John Fairfax & Sons Limited*. In this case, John Fairfax & Sons Limited sought to publish parts of a book entitled *Documents on Australian Defence and Foreign Policy 1968-1975* or documents entitled *The Strategic Basis of Australian Defence Policy* and *The Regional Outlook in South East Asia* produced by the Departments of Defence and Foreign Affairs respectively.[40] An injunction had been granted and the Commonwealth sought to extend that injunction.[41] The Commonwealth asserted copyright and confidentiality and that disclosure would 'prejudice Australia's relations with other countries, especially Indonesia, and that it has not authorized or consented to publication'.[42] The Commonwealth also asserted that publication would breach the *Crimes Act 1914* (Cth).[43] In reaching the conclusion to grant the interlocutory injunction, Justice Mason found that there was an infringement of copyright.[44] Significantly, Justice Mason expressly rejected the use of a criminal offence in the *Crimes Act 1914* (Cth) as a means of enforcing a civil remedy to protect the government's right to confidential information,[45] and that equity should apply to protect the confidentiality:[46]

> It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.
>
> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.
>
> The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security,

[36] *A v Hayden* (1984) 156 CLR 532 at 561 (Mason J).
[37] *A v Hayden* (1984) 156 CLR 532 at 577-578 (Wilson and Dawson JJ), 589 (Brennan J), 592 (Deane J).
[38] *A v Hayden* (1984) 156 CLR 532 at 563 (Murphy J).
[39] See *A v Hayden* (1984) 156 CLR 532 at 541 (Gibbs CJ), 560 (Mason J), 563-564 (Murphy J), 575 (Wilson and Dawson JJ), 597 (Deane J).
[40] *Commonwealth v John Fairfax & Sons Limited* (1980) 147 CLR 39 at 44 (Mason J).
[41] *Commonwealth v John Fairfax & Sons Limited* (1980) 147 CLR 39 at 44 (Mason J).
[42] *Commonwealth v John Fairfax & Sons Limited* (1980) 147 CLR 39 at 48 (Mason J).
[43] *Commonwealth v John Fairfax & Sons Limited* (1980) 147 CLR 39 at 48-49 (Mason J).
[44] *Commonwealth v John Fairfax & Sons Limited* (1980) 147 CLR 39 at 58-59 (Mason J).
[45] *Commonwealth v John Fairfax & Sons Limited* (1980) 147 CLR 39 at 50 (Mason J).
[46] *Commonwealth v John Fairfax & Sons Limited* (1980) 147 CLR 39 at 51-52 (Mason J).

> relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.[47]

As a clear demonstration that the 'rule of law' is a foundation principle in the exercise of executive power the *Constitution* expressly provides for the High Court to have 'original jurisdiction' in respect of 'all matters … in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.[48] Thus the constitutional basis of this protection ensures that the Legislature cannot remove judicial oversight of the Executive[49] and ensures that the 'rule of law' (however it is formulated) applies to the Executive.[50] In short:

> The reservation to this Court by the *Constitution* of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the *Constitution* of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the *Constitution*, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.[51]

Importantly, however, while 'Parliament may not … withdraw from [the High Court] the jurisdiction which it has to ensure that power given to an officer of the Commonwealth is not exceeded', the 'Parliament may lawfully prescribe the kind of duty to which an officer of the Commonwealth is subject and may lawfully prescribe the way in which that duty shall be performed'.[52] The result is that the Parliament may limit the jurisdiction under the *Constitution* s 75(v), and so aspects of the limiting executive power, if 'it does not so curtail or limit the right or ability of applicants to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure'.[53] How those limits might be achieved in practice remains to be finally determined.

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[47] *Commonwealth v John Fairfax & Sons Limited* (1980) 147 CLR 39 at 52 (Mason J).

[48] *Constitution* s 75(v).

[49] This will also apply to judges: see *R v Commonwealth Court of Conciliation and Arbitration; Ex parte the Brisbane Tramways Co Ltd* (1914) 18 CLR 54 at 62 (Griffith CJ), 66-67 (Barton J), 79 (Isaacs J), 82-83 (Gavan Duffy and Rich JJ), 85-86 (Powers J).

[50] See *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 363 (Dixon J). See also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482-484 and 492 (Gleeson CJ), 513-514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1994) 183 CLR 168 at 179 (Mason CJ), 192 (Brennan J), 205 (Deane and Gaudron JJ), 219-220 (Dawson J), 231-232 (Toohey J), 240 (McHugh J)); *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 38 at 399 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ); *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Company Ltd* (1942) 66 CLR 161 at 176 (Latham CJ), 178 (Rich J), 186 (Starke J), 186 (McTiernan J).

[51] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513-514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 671 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

[52] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 142 (McHugh J). See also *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 614-617 (Dixon J); *Ince Bros and Cambridge Manufacturing Co Pty Ltd v Federated Clothing and Allied Trades Union* (1924) 34 CLR 457 at 464 (Isaacs, Powers and Rich JJ).

[53] *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 671 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). See also Scott Guy and Barbara Hocking, 'Migration Act and the Constitutionality of Privative Clauses' (2008) 16 *Australian Journal of Administrative Law* 21; Cheryl Saunders, 'Plaintiff S157/2002: A Case Study in Common Law Constitutionalism' (2005) 12 *Australian Journal of Administrative Law* 115.

The modern 'rule of law' underpins the form and content of the Executive's exercise of power and now justifies a range of decisions that can expand and limit executive power:[54] Characterised this way, the concept are not settled, but rather evolving and mutable preferencing a particular perspective based on the specific circumstances in contention (as elegantly illustrated by preferencing a public interest over equity (breach of confidence) and legislation (copyright) in *Commonwealth v John Fairfax & Sons Limited*). As such, the 'rule of law' expressed a desirable aspiration, but does not provide much assistance in necessarily predicting a preferable outcome.

3.3 The 'separation of powers'

The *Constitution* deals with the legislative, executive and judicial powers in separate chapters so that the 'legislative power of the Commonwealth' is vested in the Parliament comprising the Senate, the House of Representatives and the Queen,[55] the 'executive power of the Commonwealth' is vested in the Queen,[56] and the 'judicial power of the Commonwealth' is vested in the High Court and other federal courts.[57] The result in Australia of adopting the 'Westminster system of government' reflected in the *Constitution* is that there is an apparent legal separation of the Parliament, the Judiciary and the Executive,[58] involvement of the Crown (and Governor-General) in both the Parliament and Executive, and a paramountcy of the Parliament over the Executive.[59] In practice, however, the distinction between the powers of the Parliament and the Executive are blurred by overlapping roles and responsibilities,[60] and a clear recognition that there are separate 'organs of government' with limited powers, albeit with overlapping powers:[61] '[s]o understood difficulties as

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[54] These include 'subjecting the monarch to parliament', 'subjecting the executive to the judiciary', 'subjecting the parliament to the judiciary', 'precedent in judicial decision making', 'deriving human legal rights', 'redressing the overweening power exercised by certain groups in society'; and so on: see Keith Mason, 'The Rule of Law' in Paul Finn (ed), *Essays on Law and Government, Volume 1 Principles and Values* (1995) p 114.

[55] *Constitution* s 1.

[56] *Constitution* s 61.

[57] *Constitution* s 71.

[58] *Attorney-General (Cth) v R* (1957) 95 CLR 529 at 537-539 (Simonds LJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 273 and 275-276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 96 (Dixon J); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 178 (Isaacs J); *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 442 (Griffith CJ); *New South Wales v Commonwealth* (1915) 20 CLR 54 at 88 (Isaacs J), 106 (Powers J), 108 (Rich J). See also Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590 at 606; W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) pp 93-94; D Thomson, 'The Separation of Powers Doctrine in the Commonwealth Constitution: The Boilermakers' Case' (1958) 2 *Sydney Law Review* 480 at 490-491.

[59] *Constitution* s 51(xxxix). The conception of 'responsible government' almost certainly requires the paramountcy of the Parliament over the Executive according to 'British political conceptions', but not over the Judiciary: *Attorney-General (Cth) v R* (1957) 95 CLR 529 at 540-541 (Simonds LJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275-276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 116 (Evatt J); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 178-179 (Isaacs J). See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 71-76 (Dawson J); *Victoria v Commonwealth* (1975) 134 CLR 338 at 406 (Jacobs J); *Victorian Chamber of Manufacturers v Commonwealth* (1943) 67 CLR 347 at 400 (Williams J); *Carter v Egg & Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 598 (Williams J); *Attorney-General for New South Wales v Trethowan* (1931) 44 CLR 394 at 425-427 (Dixon J); *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 449-450 (Isaacs J); and so on. See also Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240; George Winterton, 'Parliamentary Supremacy Re-examined' (1976) 92 *Law Quarterly Review* 591; Harold Renfree, *The Executive Power of the Commonwealth of Australia* (1984) pp 2-4.

[60] See, for examples, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 301-302 (Williams J), 328-329 (Webb J); *R v Davison* (1954) 90 CLR 353 at 381 (Kitto J); *Rola Co (Australia) Pty Ltd v Commonwealth* (1944) 69 CLR 185 at 210 (Starke J); *Johnston Fear & Kingham v Commonwealth* (1943) 67 CLR 314 at 326 (Starke J); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 178-179 (Isaacs J); *R v Federal Court of Bankruptcy, ex parte Lowenstein* (1938) 59 CLR 556 at 565 (Latham CJ), 576-577 (Starke J); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 117-118 (Evatt J); *Le Mesurier v Connor* (1929) 42 CLR 481 at 519 (Isaacs J); *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 276 (Higgins J); and so on.

[61] See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 101 (Dixon J), 118 (Evatt J).

between executive and legislative power are not to be expected … It is in connection with judicial power that questions are apt to occur'.[62] Thus:

> 'Thus, it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the *Constitution*, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions unless such powers are properly incidental to the performance by it of its own appropriate functions. From the rule, as thus stated, it appears that in very many cases the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is executive, legislative or judicial, but whether it has been specifically vested by the *Constitution* in that department, or whether it is properly incidental to the performance of the appropriate functions of the department into whose hands its exercise has been given. Generally speaking, it may be said that when a power is not peculiarly and distinctly legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested'. This principle and the conceptions of English law and tradition and British constitutional practice may explain what to some has appeared a contradiction of the view that the distribution of powers possessed a legal significance. That is to say it may explain the fact that it is the settled constitutional doctrine of the Commonwealth that the legislature, by a law otherwise within its competence, may empower the executive Government to make statutory rules and orders possessing the binding force of law.[63]

Figure 3.2 illustrates the overlapping relationship between the Parliament and Executive, with Ministers exercising both executive power and legislative power. The reality of the 'separation of powers' in Australia is that there is a considerable overlap between the legislative power and executive power:[64]

> The Constitution of the Commonwealth, in accordance with these time-honoured precedents and principles, draws a clear-cut distinction between the law-making and the law-enforcing agencies; the legislative power being vested in the Federal parliament, and the executive power being vested in the Queen, and exercisable by the Governor-General with the advice of the Federal Executive Council. The two departments are differentiated as clearly as they can be by language. But out of the Executive Council will spring a body whose name is not found in this Constitution; whose name is not legally known to the British Constitution; a body which is 'the connecting link, the hyphen, the buckle', fastening the legislative to the executive part of the Federal Government; that ministerial committee of Parliament, nominally and theoretically servants of the Crown, but in reality, though indirectly, appointed by the National Chamber; that committee whose tenure of office depends upon its retention of the confidence of the National Chamber and by and through whose agency a close union, if not a complete fusion, is established between the executive and legislative powers – THE CABINET … This separation in theory, but fusion in practice, of the legislative and executive functions, through the agency of the Cabinet, may, to those who have not much considered it, seem a dry and small matter, but it is 'the latent essence and effectual secret of the English Constitution'.[65]

The overlap between the legislative power and executive power is not complete, however, and there are some limits that maintain a separation.

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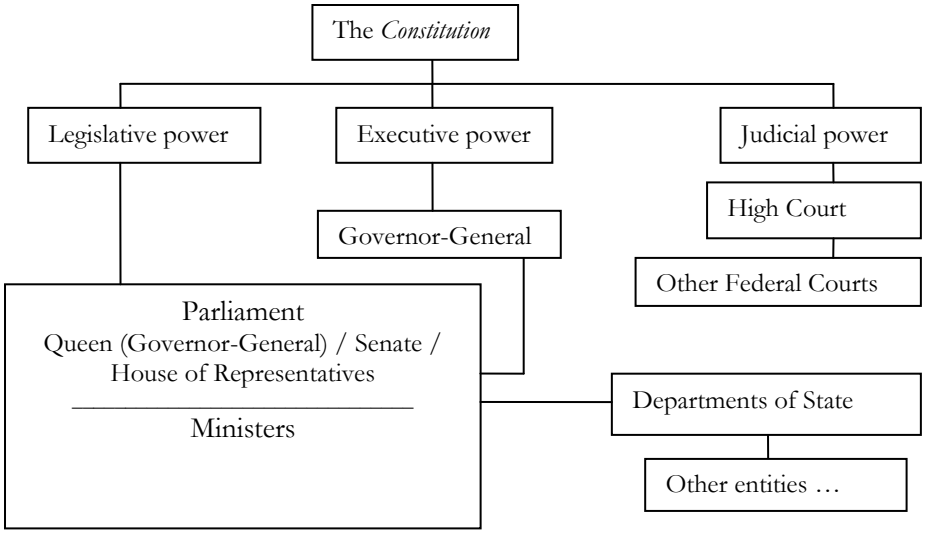
[62] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). Notably the demarcation between the legislative, executive and judicial powers has been most clearly articulated for the judicial powers: see *Attorney-General (Cth) v R* (1957) 95 CLR 529 at 540-541 (Simonds LJ). Albeit the demarcation might not need to be so clear: see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 533-534 (Callinan J); *R v Joske; Ex parte Australian Building Construction Employees & Builders' Labourers' Federation* (1973) 130 CLR 87 at 90 (Barwick CJ), 102 (Mason J). See also Michael McHugh, 'Tension between the Executive and the Judiciary' (2002) 76 *Australian Law Journal* 567; P Lane, 'The Decline of the Boilermakers Separation of Powers Doctrine' (1981) 55 *Australian Law Journal* 6 at 10-14.

[63] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 279 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) quoting Westel Willoughbyin, *Constitutional Law of the United States* (2nd ed, 1929) pp 1619-1620 (§1062). See also *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 at 10-17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Grollo v Palmer* (1995) 184 CLR 348 at 376-378 (McHugh J); *R v Federal Court of Bankruptcy, ex parte Lowenstein* (1938) 59 CLR 556 at 577 (Starke J).

[64] See also John Uhr, 'Parliament and the Executive' (2004) 25 *Adelaide Law Review* 51 at 52 ('much of the language of "separateness" is shorthand for something else: something like substantial institutional independence or initiative rather than a strict wall of separation between branches of government').

[65] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 282-283. See also George Winterton, *Parliament, The Executive and the Governor-General: A Constitutional Analysis* (1983) pp 64-65.

Figure 3.2: The 'separation of powers'
The 'separation of powers' under the *Constitution* and the overlapping relationship between the Parliament and Executive, with Ministers exercising both executive power and legislative power.



Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73

Thus, in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (see also ¶5.5, p 139) the *Transport Workers Act 1928* (Cth) gave the Governor-General in Council almost unlimited power to make regulations (the *Waterside Employment Regulations 1931* (Cth)) dealing with the employment of transport workers.[66] The appellants were then convicted of an offence when they gave preference to workers who were neither unionists nor returned servicemen when unionists were available to work[67] when the *Waterside Employment Regulations 1931* (Cth) required preference be given to unionist and returned serviceman when they were available to work.[68] The appellants challenged, in part, the validity of the *Transport Workers Act 1928* (Cth) to empower the making of regulations on the basis the Parliament could not delegate its law making powers to the Executive (as they were a 'separate' source of power).[69] The High Court rejected these contentions finding the Parliament had ample authority for both the form and content of the laws and that it was essentially for the Parliament to determine how is powers were to be applied.[70] In the words of Justice Dixon:

> … a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the *Constitution* does not operate to restrain the power of the Parliament to make such a law. This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power. Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority.[71]

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[66] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 82-83 (Gavan Duffy CJ and Starke J), 86 (Rich J), 88 (Dixon J), 111 (Evatt J).
[67] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 82-83 (Gavan Duffy CJ and Starke J), 88-89 (Dixon J), 111 (Evatt J).
[68] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 83 (Gavan Duffy CJ and Starke J), 88 (Dixon J), 111 (Evatt J).
[69] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 85 (Gavan Duffy CJ and Starke J), 86 (Rich J), 89 (Dixon J), 113 (Evatt J).
[70] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 83 (Gavan Duffy CJ and Starke J), 87 (Rich J), 102 and 111 (Dixon J), 123-124 (Evatt J). In effect also confirming the authority of *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492 (Gavan Duffy CJ, Rich, Starke, Dixon and Evatt JJ).
[71] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 101 (Dixon J).

Within these bounds, however, the legislative power of the Parliament can be delegated to the Executive. Thus:

> The *Constitution*, it is true, has broadly and, to a certain extent, imperatively separated the three great branches of government, and has assigned to each, by its own authority, the appropriate organ. But the *Constitution* is for the advancement of representative government, and contains no word to alter the fundamental features of that institution.[72]

The limits to the 'separation of powers' between the Parliament and the Executive are that the Parliament cannot abdicate its legislative powers in favour of another entity (including the Executive),[73] and the Parliament's legislating power cannot be delegated in terms that are too wide or too uncertain.[74] The justification for this latitude rests on the place of 'responsible government' where ultimately the Executive is accountable to the Parliament.[75]

The approach to the 'separation of powers' between the Judiciary and the Executive, however, is applied rigorously.[76] There is a clear restriction on the exercise of any judicial functions by bodies (including the Executive) outside the courts addressed in the *Constitution* s 71.[77] As a consequence of the apparent distinction between judicial power and the other powers, the demarcation of the other powers from judicial power is the critical perspective in establishing the 'separation of powers': 'in a federal system the absolute independence of the judiciary is the bulwark of the *Constitution* against encroachment whether by the Legislature or by the Executive'.[78] The nature of judicial power, however, remains uncertain:

> The acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstance that many positive features which are essential to the exercise of the power are not by themselves conclusive of it. Thus, although the finding of facts and the making of value judgments, even the formation of an opinion as to the legal rights and obligations of parties, are common

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[72] *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 178 (Isaacs J). See also *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 117 (Evatt J).

[73] See *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 95-96 (Dixon J), 121 (Evatt J). See also *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248 at 264 (Mason CJ, Dawson and McHugh JJ), 270-271 (Brennan, Deane and Toohey JJ); *Giris Pty Ltd v Commissioner of Taxation* (1969) 119 CLR 365 at 373 (Barwick CJ). But note that the High Court is very unlikely to find a satisfactory abdication: see, for example, *Wishart v Fraser* (1941) 64 CLR 470 at 477 (Rich ACJ), 479 (Starke J), 484-485 (Dixon J), 487-488 (McTiernan J), 489 (Williams JJ).

[74] See *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 101 (Dixon J), 121 (Evatt J). See also *Giris Pty Ltd v Commissioner of Taxation* (1969) 119 CLR 365 at 373-374 (Barwick CJ), 379 (Kitto J), 381 (Menzies J), 385 (Windeyer J).

[75] See, for examples, *Attorney-General (Cth) v R* (1957) 95 CLR 529 at 540 (Simonds LJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275-276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 84 (Gavan Duffy CJ and Starke J).

[76] See *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 at 9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Grollo v Palmer* (1995) 184 CLR 348 at 377 (McHugh J), 392 (Gummow J).

[77] See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 264 (Mason CJ and Brennan and Toohey JJ), 270-271 (Deane, Dawson, Gaudron and McHugh JJ); *Attorney-General (Cth) v R* (1957) 95 CLR 529 at 538 (Simonds LJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 277-278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 449 (Griffith CJ), 457 (Barton J), 465 and 471 (Isaacs and Rich JJ), 481 and 486 (Powers J); *New South Wales v Commonwealth* (1915) 20 CLR 54 at 62 and 65 (Griffith CJ), 88-90 (Isaacs J), 106 (Powers J), 108-110 (Rich J). In contrast, State courts can be conferred with non-judicial functions, albeit not under the authority of the *Constitution*: see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 66-68 (Brennan CJ), 81-83 (Dawson J), 94-99 (Toohey J), 103-104 and 106-107 (Gaudron J), 108-111 and 115-119 (McHugh H), 135-137 and 139-143 (Gummow J).

[78] *Attorney-General (Cth) v R* (1957) 95 CLR 529 at 540 (Simonds LJ). See also *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 84 (Gavan Duffy CJ and Starke J).

ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power.[79]

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

So while the demarcations cannot be exhaustively defined, the key area of contention concerns the Judiciary and Executive overlap, and particularly, where judicial and administrative functions overlap.[80] While there still remains some doubt as to the exact demarcation, the contours were expressly re-affirmed in *Plaintiff S157/2002 v Commonwealth* (see also ¶5.5, p 141) where the High Court rejected the Executive's (together with Parliament's) attempt to exclude judicial review (that 'secures a basic element of the rule of law')[81] by the Judiciary.[82] In *Plaintiff S157/2002 v Commonwealth* the plaintiff had been refused a 'protection visa' under the *Migration Act 1958* (Cth) and asserted that the '[Tribunal] took into account material directly relevant and adverse to [the plaintiff's claim of refugee status] without giving him notice of the material or any opportunity to address it'.[83] The *Migration Act 1958* (Cth), however, set out a 'privative clause' that certain decision, including the decisions about protection visas 'is final and conclusive', 'must not be challenged, appealed against, reviewed, quashed or called in question in any court', and 'is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account'.[84] The plaintiff contended, in part, that the *Migration Act 1958* (Cth) provisions were invalid, so allowing the challenge against the substantive natural justice (procedural fairness) questions.[85] Essentially the question crystallised to whether the High Court's jurisdiction under the *Constitution* s 75(v) conferring judicial review could be restricted by legislation, recognising that legislation could not entirely oust the High Court's jurisdiction.[86] The High Court, comprising Chief Justice Gleeson and Justices Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan, confirmed that legislation can restrict judicial review so long as it is consistent with the *Constitution*,[87] and the High Court's jurisdiction under the *Constitution*.[88] In other words, the High Court was to determine whether it had jurisdiction, and it was to be the arbiter of the exact demarcation between the judicial and administrative overlaps. Importantly, the relevant principles found considerable potential for the High Court to make this assessment on the merits of each instance and subject to fine distinctions in law, but faithful to the context of the 'rule of law' and the 'separation of powers'[89] – 'assuring to all people affected that officers of the Commonwealth obey the law'.[90]

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[79] *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See also *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 257 (Mason CJ and Brennan and Toohey JJ), 267 (Deane, Dawson, Gaudron and McHugh JJ).

[80] See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1969) 123 CLR 361 at 373 (Kitto J). For a recent example see *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ). See also DF Jackson, 'The Australian judicial system: judicial power of the Commonwealth' (2001) 24 *University of New South Wales Law Journal* 737.

[81] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482 (Gleeson CJ).

[82] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482, 494 and 495 (Gleeson CJ), 514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 535 (Callinan J).

[83] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 481-482 (Gleeson CJ), 496 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 515-516 (Callinan J).

[84] *Migration Act 1958* (Cth) s 474(1); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 497 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 529 (Callinan J).

[85] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482 (Gleeson CJ), 496 and 508 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 515-516 (Callinan J).

[86] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482 and 490-491 (Gleeson CJ), 498 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 530 (Callinan J).

[87] See *Acts Interpretation Act 1901* (Cth) s 15A providing that that an Act must be 'read and construed subject to the *Constitution*, and so as not to exceed the legislative power of the Commonwealth'.

[88] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482, 494 and 495 (Gleeson CJ), 514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 535 (Callinan J).

[89] See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492-493 (Gleeson CJ), 514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 533-534 (Callinan J).

[90] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

Chief Justice Gleeson started from the basic proposition that the Parliament cannot oust the jurisdiction of the High Court according to the *Constitution*:

> Section 75(v) of the *Constitution* confers upon this Court, as part of its original jurisdiction, jurisdiction in all matters in which a writ of mandamus, or prohibition, or an injunction, is sought against an officer of the Commonwealth. It secures a basic element of the rule of law. The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament. Within the limits of its legislative capacity, which are themselves set by the *Constitution*, Parliament may enact the law to which officers of the Commonwealth must conform. If the law imposes a duty, mandamus may issue to compel performance of that duty. If the law confers power or jurisdiction, prohibition may issue to prevent excess of power or jurisdiction. An injunction may issue to restrain unlawful behaviour. Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted … The Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the *Constitution*, or of any law made under the *Constitution*. However, in relation to the second aspect of that function, the powers given to Parliament by the *Constitution* to make laws with respect to certain topics, and subject to certain limitations, enable Parliament to determine the content of the law to be enforced by the Court.[91]

In addressing the particular impugned provision in the *Migration Act 1958* (Cth), the Chief Justice followed earlier authority[92] to find that the impugned provision, within the context of the whole Act,[93] were to be construed according to various principles.[94]

> … the Australian *Constitution* is framed upon the assumption of the rule of law.[95] Brennan J [in *Church of Scientology Inc v Woodward*] said: 'Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly'.[96]

And:

> … privative clauses are construed 'by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied'.[97]

Interpreting the impugned provision according to these and other principles, Chief Justice Gleeson concluded that the decision was not a decision to which the privative cause applied.[98]

Justices Gaudron, McHugh, Gummow, Kirby and Hayne, following earlier authority,[99] posited two basic principles that apply to interpreting privative clauses: that legislation enacted by the Parliament in opposition with the *Constitution* should be resolved by adopting an interpretation consistent with

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[91] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482-483 (Gleeson CJ). Chief Justice Gleeson also cites Lord Denning in *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 586 saying: 'If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end' (at p 483).

[92] Primarily this was *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616 (Dixon J) (that legislation enacted by the Parliament in apparent opposition with the *Constitution* should be interpreted consistent with the *Constitution*): *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 487-489 and 491 (Gleeson CJ).

[93] Noting that it is the whole legislative instrument that must be interpreted to determine its alleged 'transgression': *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 487, 489 and 493 (Gleeson CJ) citing *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616 (Dixon J) and the other citations there adopting this approach.

[94] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492-493 (Gleeson CJ).

[95] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J).

[96] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 (Gleeson CJ) citing *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70 (Brennan J).

[97] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 493 (Gleeson CJ) citing *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160 (Dawson and Gaudron JJ).

[98] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 494 (Gleeson CJ).

[99] Primarily this was *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616 (Dixon J) (that legislation enacted by the Parliament in apparent opposition with the *Constitution* should be interpreted consistent with the *Constitution*) and *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160 (Dawson and Gaudron JJ) (that the Parliament does not intend to cut down the jurisdiction of the courts): *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 504-505 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

the *Constitution*, and that the Parliament does not intend to cut down the jurisdiction of the courts.[100] Applying these principles, Justices Gaudron, McHugh, Gummow, Kirby and Hayne concluded that the impugned provision did not apply because there was a 'jurisdictional error', meaning that there was no 'decision' to which the privative clause applied:[101]

> Once it is accepted, as it must be, that [the *Migration Act 1958* (Cth)] s 474 is to be construed conformably with Ch III of the *Constitution*, specifically, s 75, the expression 'decision[s] … made under this Act' must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act. Indeed so much is required as a matter of general principle. This Court has clearly held that an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'. Thus, if there has been jurisdictional error because, for example, of a failure to discharge 'imperative duties' or to observe 'inviolable limitations or restraints', the decision in question cannot properly be described in the terms used in [the *Migration Act 1958* (Cth)] s 474(2) as 'a decision … made under this Act' and is, thus, not a [decision to which the 'privative clause' applies] (footnotes omitted).[102]

As to the constitutional validity of the privative clauses' attempt to exclude prohibition, mandamus, injunction, declaration or certiorari, Justices Gaudron, McHugh, Gummow, Kirby and Hayne reasoned that '[a]s no constitutional provision confers jurisdiction with respect to certiorari, it is open to the Parliament to legislate so as to prevent the grant of such relief'.[103] In this matter, however, the privative clause did not apply because there was a jurisdictional error, and so no decision to which the attempted exclusions might apply.[104] As a consequence, the remedies of prohibition, mandamus, injunction, declaration and certiorari were all open to the plaintiff.[105] Justices Gaudron, McHugh, Gummow, Kirby and Hayne then stated more general propositions about the role and pace of judicial review in the context of the 'rule of law':

> It is important to emphasise that the difference in understanding what has been decided about privative clauses is real and substantive; it is not some verbal or logical quibble. It is real and substantive because it reflects two fundamental constitutional propositions, both of which the Commonwealth accepts. First, the jurisdiction of this Court to grant relief under s 75(v) of the *Constitution* cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.[106]

And:

> The reservation to this Court by the *Constitution* of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision maker. Under the *Constitution* of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court.

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[100] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 504-505 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[101] See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 504-507 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[102] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[103] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 507 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[104] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 507 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[105] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 507-508 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). Notably, this might have been different if 'if injunctive relief [had been] sought on the grounds of fraud, dishonesty or other improper purpose' (at p 509).
[106] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 511-512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

> The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the *Constitution*, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.[107]

Justice Callinan, like the other justices,[108] followed earlier authority,[109] and concluded that the impugned provision in the *Migration Act 1958* (Cth) did not 'provide a shield against the discretionary remedies of prohibition, mandamus and injunction available in this Court pursuant to s 75(v) of the *Constitution*'.[110] The outcome of this decision was to confirm that a privative clause *could* have some effect, but only within the confines of the *Constitution*.[111] Significantly, the impugned decision was that of an administrative Tribunal formed by legislation making decisions about applying the legislated standards according to the merits of the particular circumstances. Questions of fact (for the Tribunal exercising executive power) and law (for the courts exercising judicial power) overlap and *only* a court can finally settle the overlap. This characterisation leaves considerable potential for uncertainty about the Judiciary and Executive overlap, and particularly, where judicial and administrative functions overlap,[112] albeit *Plaintiff S157/2002 v Commonwealth* clarifies that the exercise of executive power cannot oust the judicial power in every circumstance.

Another area where the courts have been reluctant to intervene is where judicial officers exercise executive (or legislative) functions, and visa-a-versa. As a general proposition judicial officers can exercise executive (or legislative) powers where they are 'incidental or ancillary' to the exercise of judicial powers.[113] In practice, however, the demarcation lines are not entirely clear. There seems little doubt that determining criminal guilt and contract and tort actions is 'exclusively' judicial;[114] similarly, remedies to enforce compliance by a trustee with the terms of a trust,[115] imposing punishments,[116] and so on. But clearly not administrative decisions cloaked with the authority of a court.[117] In contrast, however, administrative tribunals imposing punishments,[118] judges individually performing administrative (executive) functions such as issuing warrants and telephone intercepts

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[107] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513-514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[108] See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 487-489 and 491 (Gleeson CJ), 504-505 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[109] Primarily *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 614-616 (Dixon J): *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 531-533 (Callinan J).

[110] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 535 (Callinan J).

[111] See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 494 (Gleeson CJ), 507-508 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 535 (Callinan J).

[112] In particular note that Justice Dixon in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 614-615 stated: 'Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body'.

[113] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[114] See *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175 (Isaacs J). See also *Attorney General v Breckler* (1999) 197 CLR 83 at 109 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258 (Mason CJ, Brennan and Toohey JJ), 269 (Deane, Dawson, Gaudron and McHugh JJ).

[115] See, for example, *Attorney General v Breckler* (1999) 197 CLR 83 at 109 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[116] See, for example, *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 445 (Griffith CJ), 464-465 (Isaacs and Rich JJ), 476 (Higgins J), 482-483 (Powers J).

[117] See, for example, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 264 (Mason CJ, Brennan and Toohey JJ), 269-270 (Deane, Dawson, Gaudron and McHugh JJ).

[118] See, for example, *R v White; Ex parte Byrnes* (1963) 109 CLR 665 at 671 (Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ).

are valid;[119] similarly the House of Representatives exercising judicial power to conclusively determine contempt of Parliament,[120] and so on. As these examples demonstrate there is some overlap between judicial power and the other powers, albeit less of an overlap than the executive/legislative overlap.

A further area of overlap is where the matters in dispute are essentially political. While the distinction between essentially political matters and those that are judicial (or 'matters capable of judicial determination')[121] is difficult to identify, the High Court has been clear that where a matter requires political settlement, then the matter will not be justiciable:

> I assent to the argument that the jurisdiction of the High Court, if any, is judicial and not political. So far, therefore, as a controversy requires for its settlement the application of political as distinguished from judicial considerations, I think that it is not justiciable under the *Constitution*.[122]

Perhaps unsurprisingly then, while the 'separation of powers' may be promoted as a clear legal principle, in reality it is a theoretical conception about a political form. In short:

> … the language of separation is useful shorthand to remind us of a core part of the background doctrine of responsible government. A theory about separation of powers is basic to the political regime of liberal constitutionalism because it provides a political justification for the institutional design of constitutional institutions. It is worth emphasising that the doctrine of responsible government is just that: a doctrine or teaching about appropriate forms of government. Matters of government are broader, deeper and messier than matters of law. While it makes good sense to try to limit the abuse of governmental powers through forms of constitutional government, governing is an exercise in political judgment or prudence. And political prudence is an art of practical reasoning that is required as much within the legislature as within the political executive. Accordingly, responsible government doctrines build on a political theory about the appropriate separation of powers, including the two explicitly political powers located in legislative and executive institutions.[123]

The result is that the conception of the 'separation of powers' is a useful tool for thinking about the institutions of the Parliament, the Executive and the Judiciary, but there is no absolute separation in practice.

3.4 'Responsible government'

The conception of 'responsible government'[124] emanates from the Westminster system of government[125] *reflected* in the *Constitution*:[126] 'those practical constitutional understandings not

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[119] See *Grollo v Palmer* (1995) 184 CLR 348 at 364-365 and 367-368 (Brennan CJ, Deane, Dawson and Toohey JJ), 376-378 (McHugh J), 389-392 (Gummow J); *Hilton v Wells* (1985) 157 CLR 57 at 67 and 72-73 (Gibbs CJ, Wilson and Dawson JJ), 78 and 80-81 (Mason and Deane JJ).

[120] See *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 157 at 166-167 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ).

[121] *South Australia v Victoria* (1911) 12 CLR 667 at 674-675 (Griffith CJ), 708 (O'Connor J), 715 (Isaacs J).

[122] *South Australia v Victoria* (1911) 12 CLR 667 at 674-675 (Griffith CJ). See also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

[123] John Uhr, 'Parliament and the Executive' (2004) 25 *Adelaide Law Review* 51 at 53-54.

[124] The term 'responsible government' possibly meaning: (1) that the Executive is responsive to the public opinion through the Parliament; (2) that strong governments can take unpopular decisions in the 'national interest'; and (3) that Ministers form a government that is collectively accountable to the Parliament: see Anthony Birch, *Representative and Responsible Government: An Essay on the British Constitution* (1964) pp 17-20. However, the actual meaning of 'responsible government' is probably more a reflection of evolving theories and practices: see John Uhr, 'Parliament and the Executive' (2004) 25 *Adelaide Law Review* 51 at 55-62; J R Archer, 'The Theory of Responsible Government in Britain and Australia' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) pp 24-30. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 184-185 (Dawson J), 228-229 (McHugh J); *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1 at 47-48 (Brennan J), 69-71 (Deane and Toohey JJ); *New South Wales v Commonwealth* (1975) 135 CLR 337 at 364-365 (Barwick CJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 146-148 (Knox CJ, Rich, Isaacs and Starke JJ).

[125] Earlier debates considered these to be ideas, precepts or axioms about the nineteenth century development of government at Westminster and the 'old' dominions: see, for example, Robert Parker, 'Responsible Government in

reducible to written law which go to form responsible government'.[127] As a principle it is 'part of the fabric on which the written words of the *Constitution* are superimposed'.[128] In effect, this system of government identifies separate institutions of the Parliament, the Judiciary and the Executive, with the Crown (and Governor-General) apparently exercising significant power within the Parliament and the Executive, but in practice acting on the advice of members of the Parliament (Ministers) and *responsible* to Parliament[129] – the 'Westminster syndrome'.[130] Thus 'responsible government' explains the nature of the relationship between the Executive and the Parliament, so that the Ministers are in Parliament and responsible to Parliament, the Department (including the public service) appointments are distinct from the political appointment of Ministers, the Ministers have authority over the Departments (including the public service), and accountability follows from the Department officials (including the public service and comprising public servants) to Ministers to Cabinet to Parliament and finally to voters.[131] Perhaps the best explanation of this concept (about the place of the Crown and the Crown's representative under the *Constitution*):

> Whilst the *Constitution*, in s 61, recognises the ancient principle of the Government of England that the executive power is vested in the Crown, it adds as a graft to that principle the modern political institution, known as responsible government, which shortly expressed means that the discretionary powers of the Crown are exercised by the wearer of the Crown or by its Representative according to the advice of ministers having the confidence of

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Australia' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) p 11 and the references therein. See also Harold Renfree, *The Executive Power of the Commonwealth of Australia* (1984) pp 5-6.

[126] See also John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 703-707.

[127] *Williams v Attorney-General for New South Wales* (1932) 16 CLR 404 at 457 (Isaacs J). See also *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 364 (Mason J); *Sankey v Whitlam* (1978) 142 CLR 1 at 102 (Jacobs J); *New South Wales v Commonwealth* (1975) 135 CLR 337 at 364-365 (Barwick CJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *New South Wales v Bardolph* (1934) 52 CLR 455 at 509 (Dixon J), 517-518 (McTiernan J); *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 114 (Evatt J); *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 448-451 (Isaacs J); *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 at 411-415 (Isaacs J); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 147 (Knox CJ, Isaacs, Rich and Starke JJ); *New South Wales v Commonwealth* (1915) 20 CLR 54 at 89 (Isaacs J); and so on. See also George Winterton, *Parliament, The Executive and the Governor-General: A Constitutional Analysis* (1983) pp 1-13 and 71-85; Brian Galligan, 'The Founders' Design and Intentions Regarding Responsible Government' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) pp 2-9; Colin Hughes, 'Conventions: Dicey Revisited' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) pp 4149; LM Cooray, *Conventions, the Australian Constitution and the Future* (1979) p 18; John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 301 and 388 and the numerous other references to the concept throughout the historical introduction and commentaries.

[128] *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413 (Isaacs J). Notably, however, 'the principle of responsible government – the system of government by which the executive is responsible to the legislature – is not merely an assumption upon which the actual provisions are based; it is an integral element in the *Constitution*': *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135 (Mason CJ). See also *Bennett v Commonwealth* (2007) 231 CLR 91 at 136 (Kirby J).

[129] See *Constitution* ss 6, 49, 62, 64 and 83. See also Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) pp 84-86For an overview of the various conception see J R Archer, 'The Theory of Responsible Government in Britain and Australia' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) pp 23-30; Geoffrey Lindell, 'Responsible Government' in Paul Finn (ed), *Essays on Law and Government, Volume 1 Principles and Values* (1995) pp 75-113; Malcolm Aldons, 'Responsible, Representative and Accountable Government' (2001) 60 *Australian Journal of Public Administration* 34. See also Matthew Groves, 'Judicial Review and Ministerial Responsibility' in Matthew Groves (ed), *Law and Government in Australia* (2005) pp 83-90 and the references therein. For a critical analysis of ministerial power see Mark Aronson, 'Ministerial Directions: The Battle of the Prerogatives' (1995) 6 *Public Law Review* 77.

[130] See Robert Parker, 'Responsible Government in Australia' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) pp 12-13. Parker identifies this as the culmination of the political developments replacing the arbitrary powers of the Crown with parliamentary laws binding governments and 'the toleration of peaceful opposition and orderly transfer of power from one set of political leaders to another' with parliamentary control over government actions directed by Ministers. But for a critical perspective see Elaine Thompson, 'The "Washminster" Mutation', in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) pp 32-39.

[131] See Robert Parker, 'Responsible Government in Australia' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) p 12; Hugh Collins, 'What Shall We Do with the Westminster System?' in RFI Smith and Patrick Weller (eds), *Public Service Inquires in Australia* (1978) p 366.

> the branch if the legislature which immediately represents the people. The practical result is that the executive power is placed in the hands of a Parliamentary Committee, called the Cabinet, and the real head of the Executive is not the Queen but the Chairman, or in other words the Prime Minister.[132]

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

In more recent times the High Court in *Lange v Australian Broadcasting Corporation* (see also ¶3.5.2, p 62) has articulated the *Constitution*'s scheme of 'responsible government':[133]

> … the *Constitution* establish a formal relationship between the Executive Government and the Parliament and provide for a system of responsible ministerial government, a system of government which, 'prior to the establishment of the Commonwealth of Australia in 1901 ... had become one of the central characteristics of our polity'. Thus, s 6 of the *Constitution* requires that there be a session of the Parliament at least once in every year, so that twelve months shall not intervene between the last sitting in one session and the first sitting in the next. Section 83 ensures that the legislature controls supply. It does so by requiring parliamentary authority for the expenditure by the Executive Government of any fund or sum of money standing to the credit of the Crown in right of the Commonwealth, irrespective of source. Sections 62 and 64 of the *Constitution* combine to provide for the executive power of the Commonwealth, which is vested in the Queen and exercisable by the Governor-General, to be exercised 'on the initiative and advice' of Ministers and limit to three months the period in which a Minister of State may hold office without being or becoming a senator or member of the House of Representatives. Section 49 of the *Constitution*, in dealing with the powers, privileges and immunities of the Senate and of the House of Representatives, secures the freedom of speech in debate which, in England, historically was a potent instrument by which the House of Commons defended its right to consider and express opinions on the conduct of affairs of State by the Sovereign and the Ministers, advisers and servants of the Crown. Section 49 also provides the source of coercive authority for each chamber of the Parliament to summon witnesses, or to require the production of documents, under pain of punishment for contempt.
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> The requirement that the Parliament meet at least annually, the provision for control of supply by the legislature, the requirement that Ministers be members of the legislature, the privilege of freedom of speech in debate, and the power to coerce the provision of information provide the means for enforcing the responsibility of the Executive to the organs of representative government. In his *Notes on Australian Federation: Its Nature and Probable Effects*, Sir Samuel Griffith pointed out that the effect of responsible government 'is that the actual government of the State is conducted by officers who enjoy the confidence of the people'. That confidence is ultimately expressed or denied by the operation of the electoral process, and the attitudes of electors to the conduct of the Executive may be a significant determinant of the contemporary practice of responsible government.
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> Reference should also be made to s 128 which ensures that the *Constitution* shall not be altered except by a referendum passed by a majority of electors in the States and in those Territories with representation in the House of Representatives, taken together, and by the electors in a majority of States (footnotes excluded).[134]

The general proposition is, therefore, that 'the Ministers are responsible to the Parliament for the actions of the Crown'.[135] This proposition is, however, not so clear as the 'content of the various

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[132] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 703. See generally Solomon Encel, *Cabinet Government in Australia* (1962) (providing the Executive relationships and particularly the role and place of the Governor-General).

[133] Albeit the High Court has articulated the principle of 'responsible government' on numerous occasions: see, for examples, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135 (Mason CJ), 184-185 (Dawson J), 228-229 (McHugh J); *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1 at 47-48 (Brennan J), 69-71 (Deane and Toohey JJ); *New South Wales v Commonwealth* (1975) 135 CLR 337 at 364-365 (Barwick CJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 147 (Know CJ, Isaacs, Rich and Starke JJ).

[134] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[135] *New South Wales v Commonwealth* (1975) 135 CLR 337 at 365 (Barwick CJ). See also *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 36-41 and 43 (French CJ), 79-80 (Gummow, Crennan and Bell JJ), 185 (Heydon J); *McKinnon v Secretary, Department of the Treasury* (2006) 228 CLR 423 at 466 (Callinan and Heydon JJ); *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 308-309 (Kirby J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 392 at 464 (Gummow and Hayne JJ); *Egan v Willis* (1998) 195 CLR 424 at 451 (Gaudron, Gummow and Hayne JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135 (Mason CJ); and so on. See also John Uhr, 'Parliament and the Executive' (2004) 25 *Adelaide Law Review* 51 and the references therein; George Winterton, Parliament, *The Executive and the Governor-General: A Constitutional Analysis* (1983) p 2.

principles and practices which together may be identified in Australia as comprising "responsible government" is a matter of continued debate',[136] and dynamic evolution.[137] Thus:

> It should not be assumed that the characteristics of a system of responsible government are fixed or that the principles of ministerial responsibility which developed in New South Wales after 1855 necessarily reflected closely those from time to time accepted at Westminster. Moreover, what are now federal and State co-operative legislative schemes involve the enactment of legislation by one Parliament which is administered and enforced by Ministers and officials at another level of government, not responsible to the enacting legislature (footnotes omitted).[138]

In other words, the Ministers (and particularly the Prime Minister) are the real head of the Executive with the Governor-General (the Crown) acting on the advice of the Ministers subject only to the 'reserve powers'.[139] According to this arrangement it is the Ministers that are the conduit between the Parliament and the Executive.[140] The role of the Judiciary is merely to resolve that the Executive has not gone beyond its authority conferred by Parliament (and any prerogatives), and with a limited role in resolving disputes between the Executive and Parliament.[141] And again like the 'separation of powers', that 'responsible government' is something to be implied into the *Constitution* seems certain, although the articulation of an implication in practice have been primarily in the context of freedom of political communication, and the related concept of 'representative government (or democracy)'.

3.5 'Representative government (or democracy)'

At the time of Federation the States had different conceptions of representation both in the forums of Parliament and those who might vote for the various Parliaments (the franchise).[142] Perhaps more importantly, the Parliament itself has had a significant role in shaping the form of representation in Parliament through, for examples, secret ballots,[143] extending the franchise to women,[144] compulsory voting,[145] preferential voting for the House of Representatives,[146] proportional representation in the

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136 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 460 (Gummow and Hayne JJ).

137 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 402-403 (Gleeson CJ), 460 (Gummow and Hayne JJ); *Egan v Willis* (1998) 195 CLR 424 at 451 (Gaudron, Gummow and Hayne JJ). See also John Uhr, 'Parliament and the Executive' (2004) 25 *Adelaide Law Review* 51; Geoffrey Lindell, 'Responsible Government' in P D Finn (ed), *Essays on Law and Government, Volume One: Principles and Values* (1995) pp 75-113; R s Parker, 'Responsible Government in Australia' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) pp 11-22. Addressing the 'folly at the heart of the founders' blueprint for the Australian system of government was the presumption that "responsible government" would exist': see Jim Chalmers and Glyn Davis, *Power: Relations between the Parliament and the Executive*, Parliamentary Library Research Paper 14 (2000).

138 *Egan v Willis* (1998) 195 CLR 424 at 451 (Gaudron, Gummow and Hayne JJ).

139 See *Sue v Hill* (1999) 199 CLR 462 at 494 (Gleeson CJ, Gummow and Hayne JJ).

140 Notably, the actual avenues of this conduit between the Executive and the Parliament through the Minister are, in practice, that the Ministers remain answerable to Parliament for both their own decisions and actions *and* those of the public service hierarchy that is answerable to the Minister: see Management Advisory Board and the Management Improvement Advisory Committee, *Accountability in the Public Sector* (1993) p 6. But see *Egan v Willis* (1998) 195 CLR 424 (Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) for an example of the potential conflicts that can arise between the Executive and the Parliament. See also Matthew Groves, 'Judicial Review and Ministerial Responsibility' in Matthew Groves (ed), *Law and Government in Australia* (2005) pp 83-90.

141 See *Egan v Willis* (1998) 195 CLR 424. See also Christos Mantziaris, *Egan v Willis and Egan v Chadwick: Responsible Government and Parliamentary Privilege*, Parliamentary Library Research Paper 12 1999-2000 (1999).

142 See *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 212-214 (Hayne J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 (Gleeson CJ), 234-235 (Gummow and Hayne JJ); *McGinty v Western Australia* (1996) 186 CLR 140 at 166-167 (Brennan CJ), 201-202 (Toohey J), 240-243 (McHugh J), 270-271 and 278 (Gummow J); *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 19 (Barwick CJ), 58 (Stephen J), 69 (Murphy J). See also David Hamer, *Can Responsible Government Survive in Australia?* (2004) pp 14-18 and 46-60; John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 418-419.

143 *Commonwealth Electoral Act 1918* (Cth) s 206. See also *McGinty v Western Australia* (1996) 186 CLR 140 at 244 (McHugh J).

144 *Commonwealth Electoral Act 1918* (Cth) ss 93(1) and (2). See *Commonwealth Franchise Act 1902* (Cth) s 4. See also Audrey Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* (Cambridge University Press, 1992) pp 59-66.

145 *Commonwealth Electoral Act 1918* (Cth) s 245(1). See Tim Evans, *Compulsory Voting in Australia* (AEC, 2006) p 5. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 207 (McHugh J); *McGinty v Western Australia* (1996) 186 CLR 140 at 283 (Gummow J); *Fenderson v Bridger* (1971) 126 CLR 271 at 273 (Barwick CJ), 275 (McTiernan J), 275

Senate,[147] above the line and below the line voting in Senate elections,[148] establishing qualifications for candidates,[149] extending the franchise to Indigenous Australians,[150] expanding the representation in the Parliament,[151] prescribing the minimum voting age,[152] the payment of public funding to candidates (or registered political parties),[153] various privileges of party affiliation,[154] and so on.[155] Thus, the general proposition would appear to be that the *Constitution* establishes a scheme:[156]

> Leaving it to Parliament, subject to certain fundamental requirements, to alter the electoral system in response to changing community standards of democracy is a democratic solution to the problem of reconciling the need for basic values with the requirement of flexibility.[157]

Thus, 'the fundamental features of representative government' (or 'representative democracy')[158] are set out in the *Constitution* ss 1, 7, 8, 13, 16, 24, 25, 28, 30 and 128 (and 51(xxxvi))[159] so that the

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(Owen J); *Judd v McKeon* (1926) 38 CLR 380 at 383 (Knox CJ, Gavan Duffy and Starke JJ), 385 (Isaacs J), 390-391 (Rich J).

146 *Commonwealth Electoral Act 1918* (Cth) s 209 and sch 1 (Form F). See Ben Reilly, 'Preferential Voting and its Political Consequences' in Marian Sawer (ed), *Elections: Full, Free and Fair* (Federation Press, 2001) pp 78-94. See also *Langer v Commonwealth* (1996) 186 CLR 302 at 317 (Brennan CJ), 324-325 (Dawson J), 333 (Toohey and Gaudron JJ), 338 (McHugh J), 349 (Gummow J); *McGinty v Western Australia* (1996) 186 CLR 140 at 183-184 (Dawson J), 244 (McHugh J), 283 (Gummow J); *Ditchburn v Divisional Returning Officer for Herbert* (1999) 165 ALR 151 at 152-154 (Hayne J).

147 *Commonwealth Electoral Act 1918* (Cth) s 209 and sch 1 (Form E). See also *Langer v Commonwealth* (1996) 186 CLR 302 at 317 (Brennan CJ), 324-325 (Dawson J), 333 (Toohey and Gaudron JJ), 338 (McHugh J), 349 (Gummow J); *McGinty v Western Australia* (1996) 186 CLR 140 at 183-184 (Dawson J), 244 (McHugh J), 283 (Gummow J).

148 *Commonwealth Electoral Act 1918* (Cth) s 209 and sch 1 (Form E). See also *Ditchburn v Australian Electoral Officer for Queensland* (1999) 165 ALR 147 at 148-150 (Hayne J).

149 *Commonwealth Electoral Act 1918* (Cth) s 163. See also *In re Wood* (1988) 167 CLR 145 at 157-158 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

150 The Indigenous franchise was achieved by the *Commonwealth Electoral Act 1962* (Cth), but formal equality for Indigenous voters at Commonwealth elections (requiring enrolment) was achieved with the *Commonwealth Electoral Amendment Act 1983* (Cth).

151 *Commonwealth Electoral Act 1918* (Cth) ss 40, 48 and 48A. See Joint Standing Committee on Electoral Matters, *Inquiry into Representation of the Territories in the House of Representatives* (2003) pp 5-12. See also *Queensland v Commonwealth* (1977) 139 CLR 585 at 597-600 (Gibbs J), 602-605 (Stephen J), 606-607 (Mason J), 607-608 (Jacobs J), 610 (Murphy J); *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1976) 139 CLR 527 at 550 (Gibbs J), 562 (Stephen J), 562 (Mason J), 568 (Jacobs J), 568-570 (Murphy J); *Western Australia v Commonwealth* (1975) 134 CLR 201 at 233-234 (McTiernan J), 271-272 (Mason J), 275 (Jacobs J), 287 (Murphy J). See also Margaret Healy, *Territory Representation in the Commonwealth Parliament*, Parliamentary Library Research Note No 8 (2000).

152 *Commonwealth Electoral Act 1918* (Cth) s 93(1)(a). See also *R v Jones* (1972) 128 CLR 221 at 239 (Barwick CJ), 244 (McTiernan J), 244-246 and 250 (Menzies J), 251-252 and 255 (Walsh J), 258-261 and 266 (Gibbs J), 272 (Stephen J).

153 *Commonwealth Electoral Act 1918* (Cth) s 294.

154 Such as party affiliation recorded on the ballot paper and access to the digital electoral roll: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 230-231 (Gummow and Hayne JJ). For the example of the information on rolls and certified lists of voters to be provided to registered political parties: *Commonwealth Electoral Act 1918* (Cth) s 90B.

155 For an overview of the developments since Federation: see Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (2003) and the contributions therein; Robert Bennett, *Candidates, Members and the Constitution*, Parliamentary Library Research Paper No 18 (2002); Jennifer Norberry and George Williams, *Voters and the Franchise: The Federal Story*, Parliamentary Library Research Paper No 17 (2002); John Uhr, 'Rules of Representation: Parliament and the Design of the Australian Electoral System' in Geoffrey Lindell and Robert Bennett, *Parliament: The Vision in Hindsight* (2001) pp 249-290.

156 Noting, of course, that representative parliamentary democracy 'is manifest throughout the *Constitution*': *Western Australia v Commonwealth* (1975) 134 CLR 201 at 227 (Barwick CJ); and 'the *Constitution* is for the advancement of representative government': *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 178 (Isaacs J). Thus, '[l]ike the essential federal nature of the Commonwealth and the separation of the judicial power from other arms of government, representative parliamentary democracy informs our understanding of the specific provisions of the *Constitution* and it entails consequences, some of which may be obvious and some of which may be revealed by the general law, including the common law': *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 211 (Gaudron J).

157 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 189 (Gleeson CJ).

158 The terms 'representative government' and 'representative democracy' are used interchangeably: see *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 598 (Kirby J); *Roberts v Bass* (2002) 212 CLR 1 at 12 (Gleeson CJ); *Kruger v Commonwealth* (1997) 190 CLR 1 at 90 (Toohey J); *McGinty v Western Australia* (1996) 186 CLR 140 at 182 (Dawson J), 198

Parliament is 'representative of the people of the Commonwealth',[160] with the remaining detail to be determined by the Parliament.[161] More broadly, however, there are aspects of 'representation' that may not be reflected in the Australian governmental model that might be relevant in any conception of 'representation'. Thus, the term 'representative' in the context of 'government' suggests a system in which 'representatives of the people share, to a significant degree, in the making of political decisions' and 'the existence of a fair number of representatives of the people, meeting together in some kind of council or assembly'.[162] In this sense, the phrase 'representatives of the people' might mean (1) a representative as an agent or delegate, (2) a representative according to a selection (or election) to represent another or others, *but* not necessarily to speak and act for and on behalf of another or others, or (3) a representative of a group or class of something, in the way a statistician might arrange a particular grouping as 'representative' of a larger grouping.[163] In the context of the *Constitution*, however, the term 'representative' expressly refers to the elected members of the Senate 'directly chose by the people of the State' and elected members of the House of Representatives 'directly chose by the people of the Commonwealth',[164] and so representative according to a selection (or election) to represent others (the electorate): 'one in which representatives of the people share, to a significant degree, in the making of political decisions'.[165] Thus:

> In implementing the doctrine of representative government, the *Constitution* reserves to the people of the Commonwealth the ultimate power of governmental control. It provides for the exercise of that ultimate power by two electoral processes. The first is the election of the members of the Parliament in which is vested the legislative power of the Commonwealth and which, under the Cabinet system of government which the *Constitution* assumes, sustains and directly or indirectly controls the exercise of the executive power which the *Constitution* formally vests in the Crown. The second is … the amendment of the *Constitution* itself. Under the *Constitution*, those ultimate powers which the *Constitution* reserves to the people of the Commonwealth are exercisable by direct vote (ss 7, 24, 128).[166]

The *Constitution* s 7 provides, in respect of Senators:

> The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.[167]

(Toohey J). Notably this is not universally accepted: see, for example, *McGinty v Western Australia* (1996) 186 CLR 140 at 269 (Gummow J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 189 (Dawson J), 199 (McHugh J).

[159] Notably, the *Constitution* s 41 has probably ceased to have any practical effect as it only preserves those rights that existed before the passing of the *Commonwealth Franchise Act 1902* (Cth): see *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 264 (Gibbs CJ, Mason and Wilson JJ), 280 (Brennan, Deane and Dawson JJ).

[160] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 558-159 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[161] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 (Gleeson CJ), 206 (McHugh J), 236 (Gummow and Hayne JJ), 254-255 (Kirby J), 296 (Callinan J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 186 (Gummow, Kirby and Crennan JJ); *McGinty v Western Australia* (1996) 186 CLR 140 at 182-183 (Dawson J), 245-250 (McHugh J), 269-274 (Gummow J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 137 (Mason CJ), 157 (Brennan J), 185 (Dawson J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 46-47 (Brennan J), 70-72 (Deane and Toohey JJ); *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 56 (Stephen J); *Fabre v Ley* (1972) 127 CLR 665 at 669 (Barwick CJ, McTiernan, Menzies, Walsh, Gibbs, Stephen and Mason JJ); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 178 (Isaacs J); *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23 at 31 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ), 32 (Higgins J); *Smith v Oldham* (1912) 15 CLR 355 at 362-363 (Isaacs J); and so on.

[162] Anthony Birch, *Representative and Responsible Government: An Essay on the British Constitution* (1964) pp 13-14.

[163] See Anthony Birch, *Representative and Responsible Government: An Essay on the British Constitution* (1964) pp 14-16.

[164] *Constitution* ss 7 (Senate) and 24 (House of Representatives). See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[165] Anthony Birch, *Representative and Responsible Government: An Essay on the British Constitution* (1964) p 13.

[166] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 71-72 (Deane and Toohey JJ). See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[167] *Constitution* s 7. This will also include the Territories: *Constitution* s 122. See also *Queensland v Commonwealth* (1977) 139 CLR 585 at 597-600 (Gibbs J), 602-605 (Stephen J), 606-607 (Mason J), 607-608 (Jacobs J), 610 (Murphy J).

In respect of Members of the House of Representatives, the *Constitution* s 24 provides:

> The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.[168]

The *Constitution* also prescribes the qualification of electors. For the Senate the *Constitution* s 8 provides:

> The qualification of electors of senators shall be in each State that which is prescribed by this *Constitution*, or by the Parliament, as the qualification for electors of Members of the House of Representatives; but in the choosing of Senators each elector shall vote only once.[169]

For the House of Representatives the *Constitution* 30 provides:

> Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.[170]

The *Constitution* s 51 also provides:

> The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: … (xxxvi) matters incidental to the execution of any power vested by this *Constitution* in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

The High Court has provided some guidance about these 'fundamental features of representative government'[171] in the context the ability to cast an informed vote and the implied freedom of communication in government and political matters. These are considered in turn to illustrate the evolving conception of 'representative government' (or 'representative democracy') mandated by the *Constitution*. The detail is important, both to illustrate the potentially broad application of the constitutional requirement of 'representative government' (or 'representative democracy') and to clarify the proposition that there are *no* implications of legislative power to be drawn from 'representative government' (or 'representative democracy') *beyond* those to be drawn from the text of the *Constitution*.[172] Importantly though, there are relevant implications from the text of the *Constitution* that affect the form, representation and composition of the Executive with some prospect of arguments that there may also be other relevant implication to be made to deliver 'representative government (or democracy)'. The detail is important because 'the election of the members of the Parliament … which, under the Cabinet system of government which the *Constitution* assumes, sustains and directly or indirectly controls the exercise of the executive power'.[173] In other words, these concepts shape the mode and form of exercising executive power.

3.5.1 The ability to cast an (un)equal vote

In Australia those eligible to vote (the franchise) has been generally expanding, progressively extending to abolish limitations on the basis of legal age, sex, indigenes, ownership of property,

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[168] *Constitution* s 24.
[169] *Constitution* s 8.
[170] *Constitution* s 30.
[171] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
[172] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
[173] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 71-72 (Deane and Toohey JJ).

education, period of residence, criminal convention, mental infirmity and homelessness.[174] The various decisions of the High Court now establish that disqualification from voting (denying the franchise) is permissible if it is consistent and compatible with the maintenance of the system of representative government.[175] The decisions, however, reveal that what is considered to be consistent and compatible with the maintenance of the system of representative government remains uncertain and that the matter is essentially for the Parliament itself to determine.

Attorney-General (Cth); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1

In *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* parts of the *Commonwealth Electoral Act 1918* (Cth) (and *Representations Act 1905* (Cth)) were challenged on the basis that according to various distributions voters into electorates, and the votes of voters in electorates, did not have equivalent value in elections for the House of Representatives.[176] Essentially, the plaintiffs submitted that either in, or implied in, the *Constitution* s 24 'chosen by the people of the Commonwealth' was a guarantee that electoral divisions for House of Representatives elections should comprise equal, or 'practically equal', numbers of people or voters.[177] The justification for the plaintiffs' proposition was that equality was necessary to ensure the House of Representatives was elected on 'democratic principles'.[178] The High Court rejected the plaintiffs' propositions, finding that the Parliament could validly legislate in the *Commonwealth Electoral Act 1918* (Cth) for unequal electorates and unequal vote value.[179]

Chief Justice Barwick and Justices McTiernan, Jacobs, Gibbs and Mason (Justice Murphy dissenting)[180] addressed the text of the *Constitution* s 24,[181] and within the constitutional text as a whole,[182] finding within that text few limits on the Parliament's legislative powers:[183] 'Our duty is to declare the law as enacted in the *Constitution* and not to add to its provisions new doctrines which may happen to conform to our own prepossessions'.[184] Thus, Justices McTiernan and Jacobs stated:

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[174] See generally *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 212-214 (Hayne J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 (Gleeson CJ), 234-235 (Gummow and Hayne JJ); *McGinty v Western Australia* (1996) 186 CLR 140 at 166-167 (Brennan CJ); *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 19 (Barwick CJ), 58 (Stephen J), 69 (Murphy J); and so on. See also Jennifer Norberry and George Williams, *Voters and the Franchise: The Federal Story*, Parliamentary Library Research Paper No 17 (2002) pp 8-26.

[175] See *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 (Gleeson CJ), 202 (Gummow, Kirby and Crennan JJ).

[176] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 13-15 (Barwick CJ), 35 (McTiernan and Jacobs JJ), 43 (Gibbs J), 54-55 (Stephen J), 61 (Mason J), 63 (Murphy J). See also *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527 at 546-549 (Gibbs J), 557-560 (Stephen J), 562 (Mason J), 566-567 (Jacobs J), 570 (Murphy J).

[177] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 16-17 (Barwick CJ), 35 (McTiernan and Jacobs JJ), 43-44 (Gibbs J), 55 (Stephen J), 61 (Mason J), 64-65 (Murphy J).

[178] See *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 5 (argument), 43-44 (Gibbs J), 55 (Stephen J), 64 (Murphy J). This followed a line of authority from the United States Supreme Court interpreting the *Constitution of the United States of America* Art 1, s 2: see, for example, *Wesberry v Sanders* (1964) 376 US 1 at 7-9 (Warren CJ and Black, Douglas, Brennan, White and Goldberg JJ).

[179] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 33 (Barwick CJ), 38-39 (McTiernan and Jacobs J), 47-48 (Gibbs J), 60 (Stephen J), 61-62 (Mason J). Notably, Chief Justice Barwick (at 22-25) and Justices McTiernan and Jacobs (at 39-40), Gibbs (at 46-47), Stephen (at 59) and Mason (at 62-63) expressly rejected the United States authority as having any application to the Australian *Constitution*.

[180] Justice Murphy preferred that model from the United States *Constitution* as interpreted by the United States Supreme Court 'having as the standard of equality the alternatives of equal numbers of people and equal numbers of electors' so that the words of the *Constitution* s 24 did require an equality of voters in electorates and equality of vote value: *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 70-72 and 77 (Murphy J).

[181] Notably Chief Justice Barwick considered the similar language in the *Constitution* s 7 referring to 'States' was 'equally applicable': *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 19 (Barwick CJ).

[182] The key provisions being the *Constitution* ss 29, 30 and 51(xxxvi): *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 18-19 (Barwick CJ), 35-36 (McTiernan and Jacobs JJ), 46 (Gibbs J), 54-59 (Stephen J), 61-62 (Mason J).

[183] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 18-33 (Barwick CJ), 35-37 (McTiernan and Jacobs), 43-46 (Gibbs J), 54-58 (Stephen J), 61-62 (Mason J).

[184] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 44 (Gibbs J).

> The words 'chosen by the people of the Commonwealth' fall to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of these words in s 24. At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who might be eligible to vote before a member can be described as chosen by the people of the Commonwealth. For instance, the long established universal adult suffrage may now be recognised as a fact and as a result it is doubtful whether, subject to the particular provision in s 30, anything less than this could now be described as a choice by the people.[185]

The various judgments were unable to comprehensively characterise what were the necessary implied requirements for a 'representative democracy' according to the *Constitution*, although the majority was clear that equality of voters in electorates or equality of vote value were not constitutionally guaranteed.[186] Thus, Justice Stephen stated:

> The principle of representative democracy does indeed predicate the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus selected. However the particular quality and character of the content of each one of these three ingredients of representative democracy, and there may well be others, is not fixed and precise … representative democracy is descriptive of a whole spectrum of political institutions, each differing in countless respects yet answering to that generic description. The spectrum has finite limits and in a particular instance there may be absent some quality which is regarded as so essential to representative democracy as to place that instance outside those limits altogether; but at no one point within the range of the spectrum does there exist any single requirement so essential as to be determinative of the existence of representative democracy.[187]

For Justice Gibbs the matter was for Parliament:

> No doubt most people would agree that for the healthy functioning of a democratic system of government it is desirable that the electorate should be fairly apportioned into electoral districts whose boundaries are not gerrymandered, that the ballots should be secretly and honestly conducted, that the vote should be fairly counted and that corrupt electoral practices should be suppressed, but opinions may well differ as to how these ideals should be attained. The *Constitution* does not lay down particular guidance on these matters; the framers of the *Constitution* trusted the Parliament to legislate with respect to them if necessary, no doubt remembering that in England, from which our system of representative government is derived, democracy did not need the support of a written *Constitution*.[188]

For Justice Mason the matter was easily addressed:

> The substance of the matter is that the conception of equality in the value of a vote or equality as between electoral divisions is a comparatively modern development for which no stipulation was made in the system of democratic representative government provided for by our *Constitution*.[189]

Chief Justice Barwick and Justices McTiernan, Jacobs, Gibbs, Stephen and Mason seemed to accept that in some circumstances electorates might be so unequal and vote value so unequal that such laws might be invalid as inconsistent with the requirement of 'chosen by the people'.[190] In addition,

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[185] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36 (McTiernan and Jacobs JJ). See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 (Gleeson CJ), 218 (Hayne J); *McGinty v Western Australia* (1996) 186 CLR 140 at 201 (Toohey J), 218-219 (Gaudron J), 286-287 (McHugh J).

[186] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 33 (Barwick CJ), 35-36 (McTiernan and Jacobs JJ), 43-44 (Gibbs J), 57 (Stephen J), 62 (Mason J). Notably, Chief Justice Barwick considered that if the Parliament had not determined electorate quotas, then the *Constitution* s 61 executive power might be relied on to determine the quotas (at 29).

[187] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 56-57 (Stephen J).

[188] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 46 (Gibbs J).

[189] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 62 (Mason J).

[190] See *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 25-26 (Barwick CJ), 35 (McTiernan and Jacobs JJ), 44 (Gibbs J), 57-58 (Stephen J), 61 (Mason J).

Justices McTiernan and Jacobs also considered the 'matter of degree' should be assessed according to the circumstances of the time.[191]

McGinty v Western Australia (1996) 186 CLR 140

In the next case, *McGinty v Western Australia*, the plaintiffs challenged the distribution of votes for the election to Western Australian parliaments.[192] According to the *Electoral Distribution Act 1947* (WA) the electoral distributions meant that not all votes had the same value, with rural/mining votes being of up three times more value than metropolitan votes.[193] The plaintiffs' essential contention was that the unequal voting power of voters in different electorates was inconsistent with the principles of representative government in Australia,[194] and that the Commonwealth's *Constitution* contained a principle of representative democracy that also governed State constitutions.[195] This was a direct challenge to the proposition accepted by the High Court in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth*.[196] The prospects of such a challenge were foreshadowed following the High Court analysis of an implied freedom of communication in *Australian Capital Television Pty Ltd v Commonwealth*, *Nationwide News Pty Ltd v Wills*, *Theophanous v Herald & Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd* (discussed below).[197] The significance of the decision in *McGinty v Western Australia* was to show how the High Court majority had accepted *Attorney-General (Cth); Ex rel McKinlay v Commonwealth*, and how the conceptions of 'representative democracy' had evolved.[198] The result was that a majority rejected the plaintiff's contentions,[199] while the minority accepted that difference in the voting power of voters in different electorates *was* inconsistent with the principles of representative government.[200]

Chief Justice Brennan and Justices Dawson and McHugh rejected the contention that there was any implied general principle of representative government (or democracy) in the *Constitution*.[201] Instead they looked to the text and structure of the *Constitution*.[202] In the words of Chief Justice Brennan:

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[191] See *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36 (McTiernan and Jacobs JJ).

[192] *McGinty v Western Australia* (1996) 186 CLR 140 at 164 (Brennan CJ), 179 (Dawson J), 190 (Toohey J), 224 (McHugh J), 255 (Gummow J).

[193] *McGinty v Western Australia* (1996) 186 CLR 140 at 164-166 (Brennan CJ), 179-180 (Dawson J), 190-191 (Toohey J), 224-227 (McHugh J), 256-257 (Gummow J).

[194] *McGinty v Western Australia* (1996) 186 CLR 140 at 166 (Brennan CJ), 179 (Dawson J), 190 (Toohey J), 224 (McHugh J), 256-257 (Gummow J).

[195] *McGinty v Western Australia* (1996) 186 CLR 140 at 175-176 (Brennan CJ), 179 (Dawson J), 190 (Toohey J), 224 (McHugh J), 257 and 270 (Gummow J).

[196] *McGinty v Western Australia* (1996) 186 CLR 140 at 167 (Brennan CJ), 180 (Dawson J), 195 (Toohey J), 227 (McHugh J), 257 (Gummow J).

[197] *McGinty v Western Australia* (1996) 186 CLR 140 at 167 (Brennan CJ), 180 (Dawson J), 198-199 (Toohey J), 227 (McHugh J), 255 (Gummow J). See also *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 231-234 (Mason CJ, Toohey and Gaudron JJ), 235-236 (Brennan J), 257 (Deane J), 257-258 (Dawson J), 259 (McHugh J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 120-133 (Mason CJ, Toohey and Gaudron JJ), 145-155 (Brennan J), 163-174 (Deane J), 189-190 (Dawson J), 194-207 (McHugh J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 142 (Mason CJ), 149 (Brennan J), 169 (Deane and Toohey JJ), 187 (Dawson J), 208-217 (Gaudron J), 228-233 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 41-53 (Brennan J), 69-77 (Deane and Toohey JJ), 94-95 (Gaudron J), 105 (McHugh J). See also the earlier (misplaced) genesis of implications: *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 581-582 (Murphy J); *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 312 (Murphy J); *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 670 (Murphy J); *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 88 (Murphy J).

[198] Notably Chief Justice Brennan and Justice Dawson expressly confirmed the earlier decision in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* while the other Justices appear to accept (or distinguish) its authority (albeit a very narrow authority) and that it had not been overruled: *McGinty v Western Australia* (1996) 186 CLR 140 at 175-176 (Brennan CJ), 188-189 (Dawson J), 205 (Toohey J), 219 (Gaudron J), 279 (Gummow J). See also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 468 (Gummow and Hayne JJ).

[199] *McGinty v Western Australia* (1996) 186 CLR 140 at 176 (Brennan CJ), 189 (Dawson J), 230 (McHugh J), 293-294 and 300 (Gummow J).

[200] *McGinty v Western Australia* (1996) 186 CLR 140 at 204 and 214-215 (Toohey J), 223 (Gaudron J).

[201] *McGinty v Western Australia* (1996) 186 CLR 140 at 169 (Brennan CJ), 182 (Dawson J), 229-230 (McHugh J).

[202] *McGinty v Western Australia* (1996) 186 CLR 140 at 170 (Brennan CJ), 182 and 184 (Dawson J), 232 (McHugh J).

'The principle of "representative democracy" can be given the status of a constitutional imperative, but only in so far as the meaning and content of that principle are implied in the text and structure of the *Constitution*' (footnote omitted).[203] From the text and structure of the *Constitution* Chief Justice Brennan and Justices Dawson and McHugh could find no specific implication, instead finding a broad role for Parliament.[204] Usefully Justice Dawson outlined the *Constitution*'s expressed requirements for 'representative government', and the significant role for Parliament:

> Sections 1, 7, 8, 16, 24 and 30 of the *Constitution* provide for the minimum requirements of representative government but do not purport to go significantly further. The *Constitution* also provides for the maintenance of equal representation of the Original States in the Senate and a minimum number of senators for each Original State (s 7), the rotation of senators (s 13), the filling of casual Senate vacancies (s 15), the disqualification of members (s 44), disputed elections (s 47) and certain other matters of machinery. It further provides in s 41 that no adult person who has or acquires a right to vote for the more numerous House of Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth. Each elector has only one vote (ss 8, 30). Otherwise the form of representative government which we are to have is left to Parliament, provision being made until parliament otherwise provides (See ss 7, 8, 9, 16, 22, 24, 29, 30, 31, 34, 39, 46, 47, 48, 49). In particular, it is left to parliament to make laws determining the electoral divisions for which members of parliament may be chosen. The only limitation is that a division shall not be formed out of parts of different States. (see ss 7, 9, 29).[205]

The result for Chief Justice Brennan was to reject the plaintiff's contention that the *Constitution*'s dealing with elections extended to the States, and as a consequence the plaintiff's propositions were rejected without finally deciding the existence of implied general principle of representative government (or democracy) applying to the equality of voting power of voters in different electorates.[206] For Justices Dawson the *Constitution* mandated no particular kind of electoral system other than one chosen by those determined to be eligible to vote.[207] And for Justice McHugh there was a significant evolution since the decision in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth*, albeit one that he did not accept as 'a free-standing principle of representative democracy':[208]

> The result [of the decision in *Theophanous v Herald & Weekly Times Ltd*] seems to be that the *Constitution* contains by implication a principle of representative democracy that is not confined to restricting the powers of the federal or State legislatures, nor does it necessarily confer any rights on individuals. It appears to be a free-standing principle, just as if the *Constitution* contained a Ch IX with a s 129 which read: 'Subject to this *Constitution*, representative democracy is the law of Australia, notwithstanding any law to the contrary.' That does not mean, of course, that the implied principle of representative democracy trumps all other rights and obligations. Because the principle arises by implication, it must be subject to the express terms of the *Constitution* and be weighed in appropriate cases against other implications drawn from the text and structure of the *Constitution*. Nevertheless, when it is seen as the equivalent of the hypothetical s 129, it is plain that it is not an implication contained in the text of the *Constitution*, nor is it an implication 'logically or practically necessary for the preservation of the integrity of [the] structure' of the *Constitution*. The 'implication' has become a premise from which other implications are drawn (footnote omitted).[209]

While Justice McHugh accepted that in future there might be 'a free-standing principle of representative democracy', he considers that:

> To decide cases by reference to what the principles of representative democracy currently require is to give this Court a jurisdiction which the *Constitution* does not contemplate and which the Australian people have never authorised. Interpreting the *Constitution* is a difficult task at any time. It is not made easier by asking the justices of this Court to determine what representative democracy requires. That is a political question and, unless the

[203] *McGinty v Western Australia* (1996) 186 CLR 140 at 170 (Brennan CJ).
[204] *McGinty v Western Australia* (1996) 186 CLR 140 at 169-170 (Brennan CJ), 182 (Dawson J), 229-230 and 234 (McHugh J).
[205] *McGinty v Western Australia* (1996) 186 CLR 140 at 182-183 (Dawson J).
[206] *McGinty v Western Australia* (1996) 186 CLR 140 at 175-176 (Brennan CJ), 189 (Dawson J).
[207] *McGinty v Western Australia* (1996) 186 CLR 140 at 184-185 (Dawson J).
[208] *McGinty v Western Australia* (1996) 186 CLR 140 at 236 (McHugh J).
[209] *McGinty v Western Australia* (1996) 186 CLR 140 at 234 (McHugh J).

> *Constitution* turns it into a constitutional question for the judiciary, it should be left to be answered by the people and their elected representatives acting within the limits of their powers as prescribed by the *Constitution*.[210]

The result was that Justice McHugh could find no constitutional requirement for equality of voting power.[211] Justice Gummow reached a similar conclusion,[212] but warned:

> To adopt as a norm of constitutional law the conclusion that a constitution embodies a principle or a doctrine of representative democracy or representative government (a more precise and accurate term) is to adopt a category of indeterminate reference. This will allow from time to time a wide range of variable judgment in interpretation and application. That, of itself, may not be open to objection. However, difficulty can arise where the wide range for variable judgment depends upon, or at least includes as a significant element, matters primarily or significantly of political weight and estimation (footnotes omitted).[213]

In contrast to the other justices, Justices Toohey and Gaudron considered the difference in the voting power of voters in different electorates was inconsistent with the principles of representative government.[214] Justice Toohey concluded that '[e]quality of voting power is an underlying general requirement in the *Constitution*'[215] and surveyed the various High Court decisions said:

> … the essential feature of representative democracy is government by the people through their representatives. '[T]he powers of government belong to, and are derived from, the governed, that is to say, the people'. In 1900, the popular perception of what this entailed was certainly different to current perceptions. For instance, the franchise did not include all, or even a majority, of the population. But according to today's standards, a system which denied universal adult franchise would fall short of a basic requirement of representative democracy. The point is that, while the essence of representative democracy remains unchanged, the method of giving expression to the concept varies over time and according to changes in society. It is the current perception which is embodied in the Australian *Constitution* (footnotes excluded).[216]

Justice Toohey then distinguished *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* saying:

> An important point of distinction is that in *McKinlay* the Court was examining whether s 24, in particular the phrase 'directly chosen by the people', required equality of voting power. Most members of the Court did not examine the requirements of representative democracy. Only Gibbs J and Stephen J looked at the wider question of whether such equality was a necessary aspect of a representative democracy. So while the majority of the Court held that s 24 did not contain a requirement of voting equality, there is no majority decision on whether such a requirement is to be found in the notion of representative democracy which is the underlying basis of the *Constitution*. In that respect it is important that the decision preceded the recent decisions of this Court concerning representative democracy. It is unnecessary to overrule *McKinlay* in order to accede to the proposition that a general principle of equality of voting power is an aspect of the Australian *Constitution* (footnote excluded).[217]

Similarly, Justice Gaudron distinguished *Attorney-General (Cth); Ex rel McKinlay v Commonwealth*,[218] and considered that:[219]

> It has long been accepted that the Australian *Constitution* is 'broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve'. The words 'chosen by the people' are

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[210] *McGinty v Western Australia* (1996) 186 CLR 140 at 236 (McHugh J).
[211] *McGinty v Western Australia* (1996) 186 CLR 140 at 236-250 (McHugh J).
[212] *McGinty v Western Australia* (1996) 186 CLR 140 at 286-287 and 288-289 (Gummow J).
[213] *McGinty v Western Australia* (1996) 186 CLR 140 at 269-270 (Gummow J).
[214] *McGinty v Western Australia* (1996) 186 CLR 140 at 204 and 214-215 (Toohey J), 223 (Gaudron J).
[215] *McGinty v Western Australia* (1996) 186 CLR 140 at 204 (Toohey J).
[216] *McGinty v Western Australia* (1996) 186 CLR 140 at 201 (Toohey J).
[217] *McGinty v Western Australia* (1996) 186 CLR 140 at 205 (Toohey J).
[218] *McGinty v Western Australia* (1996) 186 CLR 140 at 219 (Gaudron J) saying: '… the fact that no precise content was given and the different approaches in the judgments require that *McKinlay* be accepted only as authority for the proposition that s 24 does not require absolute or as near as practicable equality between electorates'.
[219] Notably, Justice Gaudron also asserts that the words 'chosen by the people' are such as to 'mandate a democratic electoral system' and provides, like the authority from the United States Supreme Court interpreting the *Constitution of the United States of America* Art 1, s 2 as a 'guarantee of democracy', citing *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 65 (Murphy J).

> as broad and general as any in the *Constitution* and, as with other words which are necessarily general, they are to be approached on the basis that, although their essential meaning is unchanged, 'their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge'. They must also be interpreted bearing in mind that democracy was not a perfectly developed concept at the time of federation and, perhaps, is not yet so. These considerations necessitate that the content and application of the words 'chosen by the people' be determined in the light of developments in democratic standards and not by reference to circumstances as they existed at federation (footnotes excluded).[220]

The consequence for Justice Gaudron was that denying the franchise to women or racial groupings, or imposing property or educational qualifications, would in present times 'offend' the *Constitution* s 24's 'directly chosen by the people'.[221] Further, Justice Gaudron considered that the West Australian electoral distributions were 'at odds with democratic standards' in Australia and not 'appropriate and adapted to the dispersed nature of the population in the remote regions of Western Australia or to any other matter or circumstance which might bear on effective parliamentary representation'.[222]

Mulholland v Australian Electoral Commission (2004) 220 CLR 181

Then, in *Mulholland v Australian Electoral Commission* (see also ¶3.5.3, p 69), the appellant challenged the validity of provisions in the *Commonwealth Electoral Act 1918* (Cth) that limited registration for elections to political parties with at least 500 members unless they have at least one Parliamentary representative (the 500 rule), and the prohibition of two or more parties from relying on the same person as a member in calculating the number of members (the no overlap rule).[223] In the circumstances the application of the 500 rule and the no overlap rule would have excluded the appellant's political party from the privileges of being able to request and procure the appearance of the party's name on ballot papers with potentially significant detrimental effects on the party's electoral prospects.[224] The appellant argued, in part, that there was not power for the Parliament to legislate in respect of methods of electing Senators and members of the House of Representatives.[225] The basis of this argument was that the direct choice required by the *Constitution* was impeded or impaired by the statutory scheme, and that the statutory scheme unreasonably discriminated between candidates:[226]

> These consequences are said to follow from the application of the 500 rule and the no-overlap rule, particularly because a deregistered or unregistered political party which has less than the requisite membership number and is not a Parliamentary party cannot request and procure the appearance of its name on ballot papers. This state of affairs is said to discriminate unreasonably between candidates endorsed by registered political parties and those endorsed by unregistered parties, to interfere with a right of association through membership of the [political party], and to be apt to mislead electors into believing that candidates in fact endorsed by a political party have no affiliation with any political party.[227]

The High Court rejected the appellant's argument finding that the 500 rule and the no overlap rule were within the Parliament's powers to legislate in respect of electoral matters.[228]

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[220] *McGinty v Western Australia* (1996) 186 CLR 140 at 221 (Gaudron J).
[221] *McGinty v Western Australia* (1996) 186 CLR 140 at 221-222 (Gaudron J).
[222] *McGinty v Western Australia* (1996) 186 CLR 140 at 223 (Gaudron J).
[223] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 186 (Gleeson CJ), 201-202 (McHugh J), 228-229 (Gummow and Hayne JJ), 249 (Kirby J), 280 (Callinan J), 299 (Heydon J).
[224] See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 230-231 (Gummow and Hayne JJ).
[225] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 187 (Gleeson CJ), 202 (McHugh J), 228-229 (Gummow and Hayne JJ), 250 (Kirby J), 293 (Callinan J), 299 and 301 (Heydon J).
[226] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 191 (Gleeson CJ), 211 and 214 (McHugh J), 228-229 and 233 (Gummow and Hayne JJ), 255 (Kirby J), 293 (Callinan J), 299 and 301 (Heydon J).
[227] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 233-234 (Gummow and Hayne JJ).
[228] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 192 and 195 (Gleeson CJ), 202, 214 and 217 (McHugh J), 234 and 239-240 (Gummow and Hayne JJ), 260-261, 270 and 274 (Kirby J), 295 and 297 (Callinan J), 301 and 303 (Heydon J).

Chief Justice Gleeson referred to the paucity of detail in the *Constitution* about representative government and the role of Parliament in elaborating the detail:[229]

> The silence of the *Constitution* on many matters affecting our system of representative democracy … has some positive consequences. For example, if then current ideas as to the electoral franchise had been written into the *Constitution* in 1901, our system might now be at odds with our notions of democracy. The *Constitution* is, and was meant to be, difficult to amend. Leaving it to Parliament, subject to certain fundamental requirements, to alter the electoral system in response to changing community standards of democracy is a democratic solution to the problem of reconciling the need for basic values with the requirement of flexibility … Concepts such as representative democracy … no doubt have an irreducible minimum content, but community standards as to their most appropriate forms of expression change over time, and vary from place to place.[230]

In addressing the appellant's argument about the requirement for a direct choice,[231] Chief Justice Gleeson considered that the 'available alternatives between candidates [was] set out on the ballot paper' and that this was all that was necessary so that the 'process of choice by the electors is not impeded or impaired'.[232] In addressing the appellant's argument about discrimination between candidates,[233] Chief Justice Gleeson considered the reasons for limiting the number of candidates and 'avoiding confusion, deception and frustration of the democratic process' according to that the 500 rule and the no overlap rule respectively were ' consistent with the constitutional concept of direct choice by the people and with representative government'.[234] The result was to find the impugned provisions in provisions in the *Commonwealth Electoral Act 1918* (Cth) were valid.[235]

According to Justice McHugh the *Constitution* ss 7 and 24 are 'fundamental in ensuring that the parliamentary system for the Parliament of the Commonwealth is a system of representative government'.[236] Further the *Constitution* ss 9, 10, 31, 34 and 51(xxxvi) 'facilitate the carrying out of these requirements of representative government' by conferring legislative power with respect to elections.[237] Whether these were 'plenary'[238] or 'purposive',[239] Justice McHugh considered that 'they are subject to certain express and implied constitutional limitations'.[240] The express limitations were that there be a uniform method of choosing Senators and that both Senators and members must be 'directly chosen by the people'.[241] The implied limitations were that 'the electoral system must satisfy the requirements of the constitutionally prescribed system of representative government'[242] and the 'corollary' that 'elections must result in a direct, free, informed and genuine choice by the people'.[243] Importantly, however, Justice McHugh concluded that 'the *Constitution* does not mandate any

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[229] Citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 (Gleeson CJ).
[230] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 189-190 (Gleeson CJ).
[231] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 191 (Gleeson CJ).
[232] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 192 (Gleeson CJ).
[233] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 191 (Gleeson CJ).
[234] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 195 (Gleeson CJ).
[235] See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 195 and 201 (Gleeson CJ).
[236] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206 (McHugh J).
[237] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206 (McHugh J).
[238] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206 (McHugh J) citing *Langer v Commonwealth* (1996) 186 CLR 302 at 317 (Brennan CJ).
[239] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206 (McHugh J) citing *Langer v Commonwealth* (1996) 186 CLR 302 at 324-325 (Dawson J).
[240] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206 (McHugh J).
[241] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206 (McHugh J).
[242] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206 (McHugh J) citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
[243] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206 (McHugh J) citing *Muldowney v South Australia* (1996) 186 CLR 352 at 370-371 (Dawson J).

particular electoral system' other than the few express and implied limitations so that 'the form of representative government, including the matter of electoral systems, is left to the Parliament'.[244]

Like Chief Justice Gleeson,[245] Justice McHugh considered that the justification for the 500 rule and the no overlap rule was reasonably open to the Parliament.[246] He then approved of the statements in *McGinty v Western Australia* about the 'evolutionary nature of representative government' in the *Constitution* and that 'representative government is a dynamic rather than a static institution and one that has developed in the course of [the twentieth] century'.[247] In responding to the 500 rule and the no overlap rule affecting 'free choice', Justice McHugh concluded:

> The *Constitution* accommodates the dynamic nature of the institution of representative government 'by authorising the legislature to make appropriate provision from time to time'. This accords Parliament a broad scope to determine what is 'appropriate' – within the boundaries of the constitutionally prescribed system of representative government. It is also open to the Parliament to hold the view that, important though party identification may be, the free choice of electors will be impaired and not improved by party identification of those parties which cannot or will not comply with the challenged provisions (footnote excluded).[248]

And in respect of the rules affecting 'discrimination':

> *Langer*, *Muldowney v South Australia*, *McGinty*, *McKenzie* and the cases which follow it show that the Court will not – indeed cannot – substitute its determination for that of Parliament as to the form of electoral system, as long as that system complies with the requirements of representative government as provided for in the *Constitution*. No doubt a point could be reached where the electoral system is so discriminatory that the requirements of ss 7 and 24 are contravened. The challenged provisions cannot be so characterised (footnote excluded).[249]

The result for Justice McHugh was to find that the impugned provisions in the *Commonwealth Electoral Act 1918* (Cth) were valid.[250]

Justices Gummow and Hayne considered that the *Constitution* ss 7 and 24 phrase 'directly chosen by the people' was 'to be understood against the background of the differing arrangements made in the Australian colonies for what each would have regarded as their system of representative government'.[251] Further:

> … what also is apparent is that room was left by the *Constitution* for further development by legislation of the system of representative government, particularly with respect to the franchise and the conduct of elections … The recurrent phrase in the *Constitution* 'until the Parliament otherwise provides' accommodates the notion that representative government is not a static institution and allows for its development by changes such as those with respect to the involvement of political parties, electoral funding and 'voting above the line'. Some of these changes would not have been foreseen at the time of federation or, if foreseen by some, would not have been generally accepted for constitutional entrenchment.[252]

Justices Gummow and Hayne accepted there were 'special cases' where limiting choice (and presumably discrimination) was not possible,[253] but rejected the appellant's submissions in this case

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[244] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 207 (McHugh J) citing *McGinty v Western Australia* (1996) 186 CLR 140 at 183-184 (Dawson J).
[245] See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200-201 (Gleeson CJ).
[246] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 208-210 (McHugh J).
[247] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 213-214 (McHugh J) citing *McGinty v Western Australia* (1996) 186 CLR 140 at 279-280 (Gummow J).
[248] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 214 (McHugh J).
[249] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 217 (McHugh J).
[250] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 214 and 217 (McHugh J).
[251] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 (Gummow and Hayne JJ).
[252] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 237 (Gummow and Hayne JJ).
[253] See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 237-238 (Gummow and Hayne JJ). Notably Justice Gaudron in *McGinty v Western Australia* (1996) 186 CLR 140 at 221-222 considered that 'present circumstances [1996] would not, in my view, permit Senators and Members of the House of representatives to be described as "chosen

considering that the discrimination and limited choice (by ascribing party affiliation of the ballot) was reasonable.[254] Importantly, the choice was a balance between allowing Parliament to 'otherwise provide' and allowing a Parliamentary majority to entrench itself by manipulating the electoral laws.[255] In this case, the 500 rule and the no overlap rule was 'an officially sanctioned indication that the party is not a "shell" or "front" and that it has some reasonable minimum number of members'.[256]

For Justice Kirby the approach was about 'substance rather than form',[257] and to contemporary standards that did justify both the 500 rule and the no overlap rule within the legislative power of the Parliament:[258]

> Over the course of a century, the requirements for election to the Federal Parliament have changed as the Parliament and this Court have given new meaning to the nominated constitutional expressions … The phrase "directly chosen by the people" does not have a meaning fixed as those words were understood in 1901, or in colonial times. The words take their meaning from contemporary perceptions of their connotation and how they are intended to operate today. Illustrations of this interpretative process abound. They are too numerous to be denied (footnote omitted).[259]

Similarly, Justice Callinan considered the limiting choice discrimination were reasonable within the Parliament's broad powers under the *Constitution* to make electoral laws.[260] Justice Heydon considered the 500 rule and the no overlap rule enhanced choice[261] and promoted an informed choice rather than unreasonable discrimination.[262] According to these conclusions both Justices Callinan and Heydon considered that the impugned provisions in the *Commonwealth Electoral Act 1918* (Cth) were valid.[263]

Bennett v Commonwealth (2007) 231 CLR 91

Later in *Bennett v Commonwealth* the plaintiffs challenged the validity of the *Norfolk Island Amendment Act 2004* (Cth) that imposed Australian citizenship as a necessary qualification in both standing for elections and voting for the Norfolk Island Legislative Assembly.[264] Norfolk Island is under the authority of the Commonwealth within section 122 of the *Constitution* to 'make laws for the government of any territory'.[265] The plaintiffs contended, in part, that in making laws for the self-government of Norfolk Island, the laws should conform to the 'principles of representative government' ensuring that the legislature was 'chosen by the people', including those without Australian citizenship (as had been the long-established practice on Norfolk Island).[266] Specifically the plaintiffs contended that in establishing a form of local territory government by statute the Parliament 'must do so in a way that ensures the creation and continuing existence of a legislature that is chosen by the people of the territory in accordance with principles of representative

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by the people" within the meaning of the words in ss 7 and 24 of the *Constitution* if the franchise were to be denied to women or to members of a racial minority or to be made subject to a property or educational qualification'.

[254] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 and 239-240 (Gummow and Hayne JJ).

[255] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 237-238 (Gummow and Hayne JJ).

[256] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 240 (Gummow and Hayne JJ).

[257] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 257-258 (Kirby J) and the references therein.

[258] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 271 and 274 (Kirby J).

[259] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 261 (Kirby J).

[260] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 295 and 296 (Callinan J).

[261] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 300-301 (Heydon J).

[262] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 303 (Heydon J).

[263] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 295 and 296 (Callinan J), 301 and 303 (Heydon J).

[264] *Bennett v Commonwealth* (2007) 231 CLR 91 at 98 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 112 (Kirby J), 145-147 (Callinan J).

[265] *Bennett v Commonwealth* (2007) 231 CLR 91 at 98 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 111-112 (Kirby J), 141 (Callinan J).

[266] *Bennett v Commonwealth* (2007) 231 CLR 91 at 109 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 121-122 and 128-129 (Kirby J), 147-149 (Callinan J).

government'.[267] The High Court rejected the plaintiffs' contention finding that the law limiting standing and voting to *only* Australian citizens was valid.[268] The significance of the decision was that the High Court did not expressly find the existence of implied *general principle* of representative government (or democracy) in the *Constitution*.[269] Instead their decision was consistent with earlier decisions,[270] and as 'harmonious with the requirements of representative government under the *Constitution* as it is now understood and applied'.[271]

For Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan the content of 'representative government' was to be resolved at the level of '[w]hether … some provision made by the Parliament concerning the government of a territory might offend a requirement of the *Constitution*' and this was 'a question that does not need to be decided in this case'.[272] It was significant that the plaintiffs were unable to identify a particular obligation in the *Constitution* to enfranchise all Norfolk Islanders, including who were not Australian citizens.[273] Perhaps importantly, Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan confirmed the broad role for the Parliament in regulating the qualifications of electors:

> Bearing in mind the diversity of territories, the Parliament, if it decides to establish institutions of representative government within a territory, is not bound to conform to any particular model of representative government. There is nothing in the *Constitution*, and there is nothing inherent in the concept of representative government, that requires the Parliament, if it chooses to legislate for self-government, to enfranchise residents of Norfolk Island who are not Australian citizens.[274]

Justice Kirby retreated to the text and structure of s 122 carefully acknowledging there might be might be implications, but none that he could specifically divine from the words or purpose of s 122.[275] Justice Callinan focussed on those cases setting out the authority of s 122[276] and concluded that the kinds of constitutional standards applying to territories (like Norfolk Island) were different to those applying to States, as no particular form of relationship was mandated by the *Constitution*.[277]

Roach v Electoral Commissioner (2007) 233 CLR 162

In *Roach v Electoral Commissioner* the Commonwealth *Electoral Act 1918* (Cth) had been amended by the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth) to disqualify from voting persons who were serving a sentence of imprisonment for an offence against any law of the Commonwealth or of a State or Territory.[278] The plaintiff was convicted and imprisoned under the *Crimes Act 1958* (Vic) and asserted that the relevant amendment in the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth) was invalid as it would deny her the entitlement to vote at the forthcoming Senate and House of Representatives elections.[279] The plaintiff argued, in part, that the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth)

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[267] *Bennett v Commonwealth* (2007) 231 CLR 91 at 109 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[268] *Bennett v Commonwealth* (2007) 231 CLR 91 at 111 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 129-130 and 141 (Kirby J), 149(Callinan J).
[269] See *Bennett v Commonwealth* (2007) 231 CLR 91 at 110 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 129-130 (Kirby J), 150 (Callinan J).
[270] *Bennett v Commonwealth* (2007) 231 CLR 91 at 110 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 129-130 (Kirby J), 150 (Callinan J).
[271] *Bennett v Commonwealth* (2007) 231 CLR 91 at 131 (Kirby J).
[272] *Bennett v Commonwealth* (2007) 231 CLR 91 at 111 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[273] *Bennett v Commonwealth* (2007) 231 CLR 91 at 111 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[274] *Bennett v Commonwealth* (2007) 231 CLR 91 at 110 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[275] *Bennett v Commonwealth* (2007) 231 CLR 91 at 136-137 (Kirby J). Notably Justice Kirby cited, in part, *McGinty v Western Australia* (1996) 186 CLR 140 at 168-169 (Brennan CJ).
[276] *Bennett v Commonwealth* (2007) 231 CLR 91 at 149-158 (Callinan J).
[277] *Bennett v Commonwealth* (2007) 231 CLR 91 at 150 and 154-158 (Callinan J).
[278] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 175 (Gleeson CJ), 183-185 (Gummow, Kirby and Crennan JJ), 207 (Hayne J).
[279] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 183 and 185-186 (Gummow, Kirby and Crennan JJ), 207-208 (Hayne J).

'impermissibly limits the operation of the system of representative (and responsible) government which is mandated by the Constitution'.[280] That is, the plaintiff was contending 'that questions respecting the extent of the franchise and the manner of its exercise affect the fundamentals of a system of representative government'.[281] The High Court majority of Chief Justice Gleeson and Justices Gummow, Kirby and Crennan accepted this proposition, finding that the amendment was invalid because limiting the franchise could only be consistent and compatible with representative government if it was not 'arbitrary' (or 'broke the rational connection necessary to reconcile disenfranchisement with the constitutional imperative of choice by the people'),[282] and was 'reasonably appropriate and adapted (or "proportionate") to the maintenance of representative government'.[283] The significance of this case was to find that the failure to meet the necessary standards of representative government was sufficient to invalidate a law,[284] and the reasoning provides some insight into the relevant thresholds.

Chief Justice Gleeson considered that the phrase 'directly chosen by the people' in the *Constitution* ss 7 and 24 had evolved,[285] following the authority of *Attorney-General (Commonwealth); Ex rel McKinlay v Commonwealth* and *McGinty v Western Australia*, so that there was now a 'constitutional protection of the right to vote'.[286] The remaining question, however, was the scope of protection, recognising that:

> … the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.[287]

Chief Justice Gleeson considered that the rationale for denying the franchise lay in 'the combined facts of offending and imprisonment' and 'the right to participate in political membership of the community'.[288] In effect, imprisonment was a proxy for establishing those offences that were 'so serious as to warrant this form of exclusion from the political rights of citizenship'.[289] This proxy was appropriate to an extent:

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[280] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 186 (Gummow, Kirby and Crennan JJ), 215 (Hayne J).
[281] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 186 (Gummow, Kirby and Crennan JJ).
[282] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 (Gleeson CJ).
[283] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 202 (Gummow, Kirby and Crennan JJ). This has now been addressed in legislation: *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2010* (Cth) that amends the *Commonwealth Electoral Act 1918* (Cth) and *Referendum (Machinery Provisions) Act 1984* (Cth) to prevent certain prisoners from voting at federal elections and provide that certain prisoners may remain on, or be added to, the electoral roll.
[284] Noting that in the earlier decisions about laws affecting elector qualifications and voter's vote value the limiting laws were found to be valid: *Bennett v Commonwealth* (2007) 231 CLR 91 at 111 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 129-130 and 141 (Kirby J), 149 (Callinan J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 195 (Gleeson CJ), 202 and 217 (McHugh J), 227 and 249 (Gummow and Hayne JJ), 280 (Kirby J), 295 and 298 (Callinan J), 306 (Heydon J); *McGinty v Western Australia* (1996) 186 CLR 140 at 176 (Brennan CJ), 189-190 (Dawson J), 250 (McHugh J), 300 (Gummow J); *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 34 (Barwick CJ), 42 (McTiernan and Jacobs JJ), 47-48 (Gibbs J), 60 (Stephen J), 61 (Mason J). Notably, there were some dissenting judgments: *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 70-75 and 78 (Murphy J); *McGinty v Western Australia* (1996) 186 CLR 140 at 205 and 215-216 (Toohey J), 223 (Gaudron J).
[285] In the sense that the meaning of the words had not changed, rather the 'facts' relevant to satisfying the meaning had changed, in the same way 'foreign power' in *Sue v Hill* (1999) 199 CLR 462 had evolved with Australia's changing national and international circumstances to now include the United Kingdom as a 'foreign power': *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 173-174 (Gleeson CJ).
[286] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 (Gleeson CJ) citing *Attorney-General (Commonwealth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36 (McTiernan and Jacobs JJ) and *McGinty v Western Australia* (1996) 186 CLR 140 at 286-287 (Gummow J).
[287] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 (Gleeson CJ) citing the contrast of *McGinty v Western Australia* (1996) 186 CLR 140 at 170 (Brennan CJ).
[288] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 176 (Gleeson CJ).
[289] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 176 (Gleeson CJ).

> It is consistent with our constitutional concept of choice by the people for Parliament to treat those who have been imprisoned for serious criminal offences as having suffered a temporary suspension of their connection with the community, reflected at the physical level in incarceration, and reflected also in temporary deprivation of the right to participate by voting in the political life of the community. It is also for Parliament, consistently with the rationale for exclusion, to decide the basis upon which to identify incarcerated offenders whose serious criminal wrongdoing warrants temporary suspension of a right of citizenship. I have no doubt that the disenfranchisement of prisoners serving three-year sentences was valid, and I do not suggest that disenfranchisement of prisoners serving sentences of some specified lesser term would necessarily be invalid. The specification of a term reflects a judgment by Parliament which marks off serious criminal offending, and reflects the melancholy fact that not all sentences of imprisonment necessarily result from conduct that falls into that category.[290]

Chief Justice Gleeson then addressed the short term nature of most imprisonment and the practical problems of alternatives to custody, such as poverty, homelessness and geographical circumstances.[291] The result was to conclude that using imprisonment as a proxy for serious criminal conduct that justified disenfranchisement was undermined by short term sentences so that the proxy was 'arbitrary'.[292] As a consequence the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth) was invalid.[293]

Meanwhile Justices Gummow, Kirby and Crennan considered that:

> … the phrase 'chosen by the people' as admitting of a requirement 'of a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them'.[294] This proposition reflects the understanding that representative government as that notion is understood in the Australian constitutional context comprehends not only the bringing of concerns and grievances to the attention of legislators but also the presence of a voice in the selection of those legislators. Further, in the federal system established and maintained by the *Constitution*, the exercise of the franchise is the means by which those living under that system of government participate in the selection of both legislative chambers, as one of the people of the relevant State and as one of the people of the Commonwealth. In this way, the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic (footnotes excluded).[295]

Reiterating the Chief Justice's reasoning,[296] and the constitutional context of limiting the franchise,[297] Justices Gummow, Kirby and Crennan considered that the denial of the franchise according to the amendment operated without regard to the nature of the offence and sentence, and that the majority of sentences of imprisonment were of short duration and subject to imprisonment for practical and personal reasons that might preclude other non-imprisonment options.[298] The result of the amendment was (echoing the terminology of *Lange v Australian Broadcasting Corporation*):[299]

> … pursuit of an end which stigmatises offenders by imposing a civil disability during any term of imprisonment [taking the amendment] beyond what is reasonably appropriate and adapted (or 'proportionate') to the maintenance of representative government.[300]

With the majority concluding the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth) was invalid,[301] the remaining question was whether the earlier provision that the

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[290] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 178-179 (Gleeson CJ).
[291] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 180-182 (Gleeson CJ).
[292] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 (Gleeson CJ).
[293] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 (Gleeson CJ).
[294] Citing *McGinty v Western Australia* (1996) 186 CLR 140 at 170 (Brennan J).
[295] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 198-199 (Gummow, Kirby and Crennan JJ).
[296] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 201 (Gummow, Kirby and Crennan JJ).
[297] See *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 189-197 (Gummow, Kirby and Crennan JJ).
[298] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 200-202 (Gummow, Kirby and Crennan JJ). Notably adopting 'guidance' from *Coleman v Power* (2004) 220 CLR 1 at 51 (McHugh J), 77-78 (Gummow and Hayne JJ), 90-91 (Kirby J).
[299] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
[300] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 202 (Gummow, Kirby and Crennan JJ).
[301] See *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 (Gleeson CJ), 202 (Gummow, Kirby and Crennan JJ).

amendment replaced was itself invalid.[302] The earlier provision limited the franchise to those serving sentences of imprisonment for three or more years during the period of their imprisonment.[303] Chief Justice Gleeson reasoned that some disenfranchisement was allowed, with the *Constitution* itself imposing such limits on Senators and Members imprisoned for one year or longer.[304] That provision, however, 'recognises that the mere fact of imprisonment, regardless of the nature of the offence or the length of the term, does not necessarily indicate serious criminal conduct'.[305] Meanwhile Justices Gummow, Kirby and Crennan considered that such a provision was consistent with the colonial history and development of the *Constitution* so that 'it cannot be said that at federation such a system was necessarily inconsistent, incompatible or disproportionate in the relevant sense' and 'in the light of the legislative development of representative government since federation such an inconsistency or incompatibility has not arisen by reason of subsequent events'.[306] The result for the majority was to find the earlier provision that the amendment replaced was valid.[307]

In dissent, Justice Hayne (and with whom Justice Heydon agreed and considered the reasoning 'incontrovertible')[308] characterised the issue as whether the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth) 'would deny the *Constitution*'s [ss 7 and 24] requirement that each House of the Parliament is "directly chosen by the people"', and what limits those words imposed on the power to legislate.[309] Looking to the drafting history,[310] Justice Hayne considered that the constitutional scheme was articulated 'so that the Parliament itself could determine the franchise upon which it was elected'.[311] As a consequence, Justice Hayne concluded it was for Parliament to determine the 'the ambit of exceptions to or disqualifications from the franchise' within the 'generality' that Senators and Members of the House of Representatives were 'directly chosen by the people'.[312] That is, there is *no* constitutional 'requirement for universal adult suffrage'[313] and thus express recognition that prisoners might be excluded from voting.[314] Perhaps poignantly Justice Hayne states:

> … the *Constitution* does not establish a form of representative democracy in which the limits to the legislative power of the Parliament with respect to the franchise are to be found in a democratic theory which exists and has its content independent of the constitutional text. The form of representative democracy for which the *Constitution* provides was established with British and American models at the forefront of the framers' consideration. But neither of those models was adopted. The *Constitution* provided its own form of government: a form of government in which there are elements that evidently draw on the experience of others but which, taken as a whole, is unique. To impose upon the text and structure that was adopted a priori assumptions about what is now thought to be a desirable form of government or would conform to a pleasingly symmetrical theory of government is to do no more than assert the desirability of a particular answer to the issue that now arises.[315]

In addressing the plaintiff's particular submissions, Justice Hayne found that the plaintiff was unable to articulate any criteria for 'representative government' other than an implicit assertion that 'the

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[302] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 (Gleeson CJ), 202-204 (Gummow, Kirby and Crennan JJ).
[303] See *Commonwealth Electoral Act 1918* (Cth) s 9(8) as amended by the *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (Cth) sch 1 (item 1). See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 175 (Gleeson CJ), 184 and 197 (Gummow, Kirby and Crennan JJ).
[304] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 180 (Gleeson CJ). See also *Constitution* s 44(ii).
[305] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 180 (Gleeson CJ).
[306] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 184 and 204 (Gummow, Kirby and Crennan JJ).
[307] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 (Gleeson CJ), 204 (Gummow, Kirby and Crennan JJ).
[308] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 223 (Heydon J).
[309] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 206 (Hayne J).
[310] See *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 208-210 (Hayne J). Notably Justice Hayne also examines the different franchises in each State that were 'picked up' by the *Constitution* s 30 (at 212-215).
[311] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 206 (Hayne J).
[312] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 206 (Hayne J).
[313] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 210 (Hayne J).
[314] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 211-212 (Hayne J).
[315] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 214-215 (Hayne J).

qualification of electors must have a particular content' that was to 'operate in an arbitrary and discriminatory manner' and be 'both over- and under-inclusive'.[316] Justice Hayne concluded that the 'assertion is not based on constitutional text or history and the argument thus becomes circular' and this was a 'flawed' approach.[317]

Justice Hayne also rejected the adoption of the *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* conceptions of 'the common understanding of the time' and the changing meaning over time of the phrase 'directly chosen by the people'.[318] The key rejecting argument being:

> … it is not to be supposed that the ambit of the relevant constitutional power (as distinct from the political capacity to exercise the power) is constrained by what may, from time to time, be identified as politically accepted or acceptable limits to the qualifications that may be made to what now is an otherwise universal adult suffrage. Political acceptance and political acceptability find no footing in accepted doctrines of constitutional construction. The meaning of constitutional standards does not vary with the level of popular acceptance that particular applications of the power might enjoy.[319]

Thus, the difference between the majority and the dissents would appear to be an appeal to legalism and the difference between the *Constitution* evolving to incorporate modern conceptions of representative government that may not have been accepted at Federation.[320] This is significant as it means that there may again be the potential to argue a broader implication of legislative power beyond the text of the *Constitution*,[321] albeit confined by a standard of 'reasonably appropriate and adapted (or "proportionate") to the maintenance of representative government'.[322]

Rowe v Electoral Commissioner [2010] HCA 46 (15 December 2010)

In *Rowe v Electoral Commissioner* the plaintiff challenged amendments to the *Commonwealth Electoral Act 1918* (Cth) by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) that closed the electoral rolls on the day writs for the election were issued effectively disenfranchising those wanting to enrol or transfer their enrolment.[323] The result was to find the amendments were invalid, essentially reflecting an opinion of the court that such a measure unreasonably diminished the franchise.[324] The Commonwealth main argument was that the amendments were necessary to improve the electoral system albeit some (100,000) voters were disenfranchised.[325]

For Chief Justice French the 'irreversible evolution'[326] of the terms 'chosen by the people' and the 'the heavy price imposed by the Amendment Act in terms of its immediate practical impact upon

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316 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 215 (Hayne J).
317 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 215 (Hayne J).
318 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 215 (Hayne J) pointing to the judgment in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36 (McTiernan and Jacobs JJ).
319 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 219 (Hayne J).
320 See Michael McHugh, 'The Constitutional Jurisprudence of the High Court' (2008) 30 *Sydney Law Review* 5 at 9.
321 This appears to be contrary to the conclusion in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) and perhaps resurrecting earlier propositions expanding the Commonwealth's legislating potential: see, for example, *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36 (McTiernan and Jacobs JJ).
322 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 202 (Gummow, Kirby and Crennan JJ).
323 *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010) at [57]-[70] (French CJ), [100]-[107] (Gummow and Bell JJ), [175] (Hayne J), [267] (Heydon J), [316] (Crennan J), [393] (Kiefel J).
324 *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010) at [79] (French CJ), [167]-[168] (Gummow and Bell JJ), [385] (Crennan J). This has now been addressed in legislation: *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2010* (Cth) that amends the *Commonwealth Electoral Act 1918* (Cth) and *Referendum (Machinery Provisions) Act 1984* (Cth) to provide that the electoral roll closes seven days after the date of the writ for a federal election.
325 *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010) at [6]-[7] (French CJ), [152]-[159] (Gummow and Bell JJ), [254] (Hayne J), [380] (Crennan J).
326 *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010) at [20] (French CJ) citing *Roach v Electoral Commissioner* (2007) 233 CLR 162 (Gleeson CJ).

the fulfilment of the constitutional mandate was disproportionate to the benefits of a smoother and more efficient electoral system to which the amendments were directed'[327] were sufficient to find the amendment invalid.[328] Similarly Justices Gummow and Bell considered that the 'practical operation goes beyond any advantage in preserving the integrity of the electoral process from a hazard which so far has not materialised to any significant degree' and that the disenfranchisement was unjustified.[329] Justice Crennan also concluded that the amendments had 'not been shown to be necessary or appropriate for the protection of the integrity of the Rolls' (proportionality) and so were invalid.[330] Justices Hayne, Haydon and Kiefel dissented.[331]

2.5.2 The ability to cast an informed vote

In a series of decisions the High Court considered arguments that the *Constitution* included an implied right to the freedom of communication in government and political matters was a necessary corollary to representative (and responsible) government.[332] In essence the argument is that for 'the people' to carry out the function of choosing their Parliamentary representatives as required by the *Constitution*'s conception of representative government, then laws that limited this freedom are beyond power and invalid. The matter was comprehensively addressed with a formulated test in the unanimous High Court decision in *Lange v Australian Broadcasting Corporation*[333] (and possibly clarified in *Levy v Victoria*).[334]

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

The High Court in *Lange v Australian Broadcasting Corporation* (see also ¶3.4, p 43) directly considered the proposition that 'there is implied in the *Constitution* a defence to the publication of defamatory matter relating to government and political matters'.[335] The matter arose as a defamation action over matters published by the defendant Australian Broadcasting Corporation in New South Wales about the plaintiff when he was a member of the New Zealand Parliament.[336] The defendant argued that the matters were published 'pursuant to a freedom guaranteed by the Commonwealth Constitution to publish material … in the course of discussion of government and political matters' and as a consequence were not actionable.[337] The plaintiff argued that the earlier decisions in *Theophanous v*

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327 *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010) at [78] (French CJ).
328 *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010) at [79] (French CJ).
329 *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010) at [167]-[168] (Gummow and Bell JJ).
330 *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010) at [384]-[385] (Crennan J).
331 *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010) at [264]-[265] (Hayne J), [315] (Heydon J), [490] (Kiefel J).
332 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Langer v Commonwealth* (1996) 186 CLR 302 at 317-319 (Brennan CJ), 324 and 326 (Dawson J), 333-334 (Toohey and Gaudron JJ), 340 (McHugh J), 349-351 (Gummow J); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 298-301 (Mason CJ), 326-328 (Brennan J), 335-338 (Deane J), 360-363 (Dawson J), 378-380 (Toohey J), 387-389 (Gaudron J), 395 (McHugh J); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 231-232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 120-125 (Mason CJ, Toohey and Gaudron JJ), 145-152 (Brennan J), 164-167 (Deane J), 192-193 (Dawson J), 205-207 (McHugh J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 140-142 (Mason CJ), 168-169 (Deane and Toohey JJ), 215-218 (Gaudron J), 227-228 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50-51 (Brennan J), 72-77 (Deane and Toohey JJ).
333 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
334 See *Levy v Victoria* (1997) 189 CLR 579 at 646 (Kirby J): 'does the law which is impugned have the effect of preventing or controlling communication upon political and governmental matters *in a manner which is inconsistent* with the system of representative government for which the *Constitution* provides?' (emphasis added). See also *Coleman v Power* (2004) 220 CLR 1 at 51 (McHugh J), 77-78 (Gummow and Hayne JJ), 82 (Kirby J).
335 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 550 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
336 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 550-551 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
337 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 551 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

Herald & Weekly Times Ltd and *Stephens v West Australian Newspapers Ltd* were wrongly decided.[338] Unable to glean a clear authority from either *Theophanous v Herald & Weekly Times Ltd* or *Stephens v West Australian Newspapers Ltd*,[339] and not necessarily being bound by authority,[340] the High Court comprising Chief Justice Brennan and Justices Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby considered the question as a matter of principle.[341] The High Court started by articulating the *Constitution*'s scheme of 'representative government':

> Sections 7 and 24 of the *Constitution*, read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively. This requirement embraces all that is necessary to effectuate the free election of representatives at periodic elections. What is involved in the people directly choosing their representatives at periodic elections, however, can be understood only by reference to the system of representative … to which ss 7 and 24 and other sections of the *Constitution* give effect.
>
> That the *Constitution* intended to provide for the institutions of representative … is made clear both by the Convention Debates and by the terms of the *Constitution* itself. Thus, at the Second Australasian Convention held in Adelaide in 1897, the Convention, on the motion of Mr Edmund Barton, resolved that the purpose of the *Constitution* was 'to enlarge the powers of self-government of the people of Australia'.
>
> Sections 1, 7, 8, 13, 24, 25, 28 and 30 of the *Constitution* give effect to the purpose of self-government by providing for the fundamental features of representative government. As Isaacs J put it:
>
> > '[T]he *Constitution* is for the advancement of representative government.'
>
> Section 1 of the *Constitution* vests the legislative power of the Commonwealth in a Parliament 'which shall consist of the Queen, a Senate, and a House of Representatives'. Sections 7 and 24 relevantly provide:
>
> > '7 The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.
> > ...
> > 24 The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.'
>
> Section 24 does not expressly refer to elections, but s 25 makes it plain that the House of Representatives is to be directly chosen by the people of the Commonwealth voting at elections. Other provisions of the *Constitution* ensure that there shall be periodic elections. Thus, under s 13, six years is the longest term that a senator can serve before his or her place becomes vacant. Similarly, by s 28, every House of Representatives is to continue for three years from the first meeting of the House and no longer. Sections 8 and 30 ensure that, in choosing senators and members of the House of Representatives, each elector shall vote only once. The effect of ss 1, 7, 8, 13, 24, 25, 28 and 30 therefore is to ensure that the Parliament of the Commonwealth will be representative of the people of the Commonwealth.[342]

Then in addressing the argument about the 'freedom of communication on matters of government and politics' the High Court reasoned:

> Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the *Constitution* creates by directing that the members of the House of

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[338] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 551-552 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[339] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 552-556 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[340] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) citing *Baker v Campbell* (1983) 153 CLR 52 at 102 (Brennan J); *Queensland v Commonwealth* (1977) 139 CLR 585 at 610 (Jacobs J); *Damjanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390 at 395-396 (Barwick CJ).

[341] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 556 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[342] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-558 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

> Representatives and the Senate shall be 'directly chosen by the people' of the Commonwealth and the States, respectively. At federation, representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system As Birch points out, 'it is the manner of choice of members of the legislative assembly, rather than their characteristics or their behaviour, which is generally taken to be the criterion of a representative form of government'. However, to have a full understanding of the concept of representative government, Birch also states that: 'we need to add that the chamber must occupy a powerful position in the political system and that the elections to it must be free, with all that this implies in the way of freedom of speech and political organisation'.
>
> Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation. While the system of representative government for which the *Constitution* provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections under that system in Australia prior to federation, that the elections for which the *Constitution* provides were intended to be free elections in the sense explained by Birch. Furthermore, because the choice given by ss 7 and 24 must be a true choice with 'an opportunity to gain an appreciation of the available alternatives', as Dawson J pointed out in *Australian Capital Television Pty Ltd v Commonwealth*, legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.
>
> That being so, ss 7 and 24 and the related sections of the *Constitution* necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power (footnotes omitted).[343]

Significantly the High Court clarified that the 'freedom of communication on matters of government and politics' is 'not absolute':

> It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*. The freedom of communication required by ss 7 and 24 and reinforced by the sections concerning responsible government and the amendment of the Constitution operates as a restriction on legislative power. However, the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end.[344]

The High Court then articulated the 'test':

> When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by s 7, 24, 64 or 128 of the *Constitution*, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and

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[343] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[344] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). Notably the High Court acknowledged that other justices had used the terminology of 'proportionality' but decided not to distinguish between 'reasonably appropriate and adapted' and 'proportionality' in this decision, perhaps leaving open the prospect that the standards are different. See also *Coleman v Power* (2004) 220 CLR 1 at 32 (Gleeson CJ). But see *R v Tang* (2008) 249 ALR 200 at 228 (Kirby J); *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 (Gummow, Kirby and Crennan JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 252 (Kirby J); *Coleman v Power* (2004) 220 CLR 1 at 90 (Kirby J), 110 (Callinan J). See also HP Lee, 'The "Reasonably Appropriate and Adapted" Test and the Implied Freedom of Political Communication' in Matthew Groves (ed), *Law and Government in Australia* (2005) pp 59-81. See generally Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1.

> responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people … If the first question is answered 'yes' and the second is answered 'no', the law is invalid.[345]

Applying the principle to the present question, the High Court considered the New South Wales defamation laws did burden freedom of communication about government or political matters by requiring the payment of damages or granting of injunctions against publication.[346] The next question of whether the defamation laws were 'reasonably appropriate and adapted to serving the legitimate end of protecting personal reputation without unnecessarily or unreasonably impairing the freedom of communication about government and political matters protected by the *Constitution*' was more complex.[347] The High Court considered that the New South Wales defamation laws satisfied this standard, and so the defence that 'the defamatory matter was published pursuant to a freedom guaranteed by the *Constitution*' failed.[348]

Subsequent decisions have confirmed that there is an implied constitutional freedom of communication on matters of government and politics, although distinguishing the boundaries has remained difficult and contentious.[349] This has been particularly difficult as there is considerable scope to frame particular circumstances as 'governmental' or 'political' according to the particular construction of the impugned regulation and the conception of the 'freedom'.[350] The High Court has determined that the scope of the implied constitutional freedom of communication on matters of government and politics according to the 'reasonably appropriate and adapted' is limited. The effect is to maintain the Parliament's ability to articulate most of the detail of 'representative government (or democracy)'. The following decisions in *Coleman v Power* and *Mulholland v Australian Electoral Commission* illustrate this contention.

Coleman v Power (2004) 220 CLR 1

In *Coleman v Power* the appellant was distributing pamphlets which contained charges of corruption against several police officers as part of a protest in Townsville.[351] Following an altercation with a police officer about the pamphlets the appellant was convicted of an offence of using insulting words in a public place.[352] The appellant contended that the *Vagrants, Gaming and Other Offences Act*

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345 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

346 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

347 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

348 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 575 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

349 See *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199-200 (Gummow, Kirby and Crennan JJ); *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 250-351 (Gleeson CJ and Heydon J), 359 (McHugh J), 402 (Gummow J), 438-440 (Kirby J), 449-450 (Hayne J), 477 (Callinan J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 195-201 (Gleeson CJ), 217-225 (McHugh J), 244-249 (Gummow and Hayne JJ), 274-279 (Kirby J), 293 (Callinan J), 303-306 (Heydon J); *Coleman v Power* (2004) 220 CLR 1 at 30 (Gleeson CJ), 43-46 (McHugh J), 77 (Gummow and Hayne JJ), 82-83 (Kirby J), 113-114 (Callinan J), 120-127 (Heydon J); *Roberts v Bass* (2002) 212 CLR 1 at 26-30 (Gaudron, McHugh and Gummow JJ), 58-60 (Kirby J), 76-79 (Hayne J), 101-103 (Callinan J); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 280-282 and 284-286 (Kirby J), 330-333 and 337-339 (Callinan J); *McClure v Australian Electoral Commission* (1999) 163 ALR 734 at 740-741 (Hayne J); *Kruger v Commonwealth* (1997) 190 CLR 1 at 68-70 (Dawson J), 90-91 (Toohey J), 114-121 (Gaudron J), 142-144 (McHugh J); *Levy v State of Victoria* (1997) 189 CLR 579 at 596-599 (Brennan CJ), 607-609 (Dawson J), 610-615 (Toohey and Gummow JJ), 620 (Gaudron J), 624-628 (McHugh J), 644-648 (Kirby J).

350 See, for examples, *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 403-404 (Gummow J), 451 (Hayne J) referring to *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 329 (Brennan J).

351 *Coleman v Power* (2004) 220 CLR 1 at 21 (Gleeson CJ), 35 (McHugh J), 66 (Gummow and Hayne JJ), 102 (Callinan J), 115 (Heydon J).

352 *Coleman v Power* (2004) 220 CLR 1 at 21 (Gleeson CJ), 33-36 (McHugh J), 64 (Gummow and Hayne JJ), 102-103 (Callinan J), 115 (Heydon J).

1931 (Qld) establishing the offence of 'uses any threatening, abusive, or insulting words to any person' in a public place was unconstitutional because it was inconsistent with the freedom of political communication implied in the *Constitution*.[353] The parties and the High Court accepted that the appellant's contention addressed the principle in *Lange v Australian Broadcasting Corporation* and that the practical operation of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) might burden communication about governmental or political matters.[354] The issue for the High Court was to apply the principle in *Lange v Australian Broadcasting Corporation* to the particular offence according to the appellant's particular facts circumstances.[355] The result was that the High Court majority concluded that the conviction for using insulting words should be set aside.[356] However, *only* Justice McHugh reached this decision on the basis that the impugned law did unnecessarily or unreasonably impair the freedom of communication about government and political matters protected by the *Constitution*.[357] In contrast Justices Gummow, Kirby and Hayne interpreted the law in a fashion that was consistent with the freedom of communication about government and political matters protected by the *Constitution* finding that the law was reasonably appropriate and adapted to serve the legitimate public end of keeping public places free from violence, but in the circumstances, the offence was not made out on the evidence.[358] The reasoning of the various decisions illustrates the different approaches to assessing the effect of the implied constitutional freedom.

Chief Justice Gleeson considered the appellant's claims possessed a 'degree of artificiality' and as a consequence '[r]econciling freedom of political expression with the reasonable requirements of public order becomes increasingly difficult when one is operating at the margins of the term "political"'.[359] He adopted the approach of Justice Gaudron in *Levy v Victoria*:[360]

> If the direct purpose of the law is to restrict political communication, it is valid only if necessary for the attainment of some overriding public purpose. If, on the other hand, it has some other purpose, connected with a subject matter within power and only incidentally restricts political communication, it is valid if it is reasonably appropriate and adapted to that other purpose.[361]

According to this approach, Chief Justice Gleeson considered that the *Vagrants, Gaming and Other Offences Act 1931* (Qld) offence was an 'appropriate balance of all the various rights, freedoms, and interests' of 'amenity and security of citizens, and so that they may exercise, without undue disturbance, the rights and freedoms involved in the use and enjoyment of such places'.[362] As a consequence he considered the laws were valid and the conviction lawful.[363]

For Justice McHugh the approach was fairly straightforward:

> In determining whether a law is invalid because it is inconsistent with freedom of political communication, it is not a question of giving special weight in particular circumstances to that freedom. Nor is it a question of balancing a legislative or executive end or purpose against that freedom. Freedom of communication always trumps federal, State and Territorial powers when they conflict with the freedom. The question is not one of weight or balance but whether the federal, State or Territorial power is so framed that it impairs or tends to impair the effective operation of the constitutional system of representative and responsible government by impermissibly burdening

353 *Coleman v Power* (2004) 220 CLR 1 at 21 and 30 (Gleeson CJ), 32-33 and 36-37 (McHugh J), 64 (Gummow and Hayne JJ), 103 (Callinan J), 115 (Heydon J).
354 *Coleman v Power* (2004) 220 CLR 1 at 30 (Gleeson CJ), 32-33 and 43-44 (McHugh J), 64 and 78 (Gummow and Hayne JJ), 109 (Callinan J), 116 and 120 (Heydon J).
355 *Coleman v Power* (2004) 220 CLR 1 at 30 (Gleeson CJ), 32-33 and 46 (McHugh J), 64 (Gummow and Hayne JJ), 85-86 (Kirby J), 109 (Callinan J), 120-121 (Heydon J).
356 *Coleman v Power* (2004) 220 CLR 1 at 33 and 54 (McHugh J), 79 (Gummow and Hayne JJ), 100 (Kirby J).
357 *Coleman v Power* (2004) 220 CLR 1 at 54 (McHugh J).
358 *Coleman v Power* (2004) 220 CLR 1 at 78 (Gummow and Hayne JJ), 91 (Kirby J).
359 *Coleman v Power* (2004) 220 CLR 1 at 30-31 (Gleeson CJ).
360 *Coleman v Power* (2004) 220 CLR 1 at 31 (Gleeson CJ).
361 *Levy v Victoria* (1997) 189 CLR 579 at 619 (Gaudron J).
362 *Coleman v Power* (2004) 220 CLR 1 at 32 (Gleeson CJ).
363 *Coleman v Power* (2004) 220 CLR 1 at 32 (Gleeson CJ).

> communications on political or governmental matters. In all but exceptional cases, a law will not burden such communications unless, by its operation or practical effect, it directly and not remotely restricts or limits the content of those communications or the time, place, manner or conditions of their occurrence. And a law will not impermissibly burden those communications unless its object and the manner of achieving it is incompatible with the maintenance of the system of representative and responsible government established by the *Constitution* (footnote omitted).[364]

According to Justice McHugh the 'true test' was that propounded by Justice Kirby in *Levy v Victoria*:[365] 'does the law which is impugned have the effect of preventing or controlling communication upon political and governmental matters in a manner which is inconsistent with the system of representative government for which the *Constitution* provides?'.[366] Then Justice McHugh recognised that laws might limit communications, but that these laws could still be valid if they had the effect of promoting representative and responsible government.[367] In response to the respondent's contentions that the impugned laws here were to avoid breaches of the peace and 'protected free political communication by removing threats, abuses and insults from the arena of public discussion'.[368] Justice McHugh considered that regulation to 'preventing breaches of the peace' and 'intimidation of participants in debates on political and governmental matters' was compatible with representative government, but not where there was an unqualified prohibition.[369] Such regulation needed to be qualified, such as requiring 'proof of a breach of the peace' or the 'intention to commit the breach elements of the offence'.[370] As the *Vagrants, Gaming and Other Offences Act 1931* (Qld) offence was unqualified then the limits on communication were not justified and the conviction could not be supported.[371] Significantly, the invalidity only applied to those circumstances were they addressed 'insulting words uttered in discussing or raising matters concerning politics and government in or near public places'.[372]

Justices Gummow and Hayne interpreted the offence with 'the requirement that "threatening, abusive, or insulting words" be used *to* a person … [and] not directed simply to regulating the way in which people speak in public'.[373] Further, their interpretation required that the words used be 'provocative' in the sense of an intention, or a reasonable likelihood, of provoking unlawful physical retaliation.[374] With this interpretation the offence was 'reasonably appropriate and adapted to serve the legitimate public end of keeping public places free from violence', and as such, was 'entirely compatible' with the *Lange v Australian Broadcasting Corporation* second test.[375] Further as Justices Gummow and Hayne interpreted the offence as requiring insults that the policeman would consider hurtful and provoke physical retaliation,[376] and as hurtful and provocative insults were a part of the policeman's lot, something more was required for there to be a successful conviction in the circumstances.[377] The result was a decision that that conviction should be set aside.[378]

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[364] *Coleman v Power* (2004) 220 CLR 1 at 49-50 (McHugh J). Notably Justices Gummow, Hayne and Kirby agreed with Justice McHugh's formulation of the *Lange v Australian Broadcasting Corporation* second question: 'is the law reasonably appropriate and adapted to serve a legitimate end [in a manner] which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government' (at 78 (Gummow and Hayne JJ), 82 (Kirby J)).
[365] *Coleman v Power* (2004) 220 CLR 1 at 51 (McHugh J).
[366] *Levy v Victoria* (1997) 189 CLR 579 at 646 (Kirby J).
[367] *Coleman v Power* (2004) 220 CLR 1 at 51-53 (McHugh J).
[368] *Coleman v Power* (2004) 220 CLR 1 at 53 (McHugh J).
[369] *Coleman v Power* (2004) 220 CLR 1 at 53-54 (McHugh J).
[370] *Coleman v Power* (2004) 220 CLR 1 at 53-54 (McHugh J).
[371] *Coleman v Power* (2004) 220 CLR 1 at 54 (McHugh J).
[372] *Coleman v Power* (2004) 220 CLR 1 at 54-56 (McHugh J).
[373] *Coleman v Power* (2004) 220 CLR 1 at 76 (Gummow and Hayne JJ).
[374] *Coleman v Power* (2004) 220 CLR 1 at 74 (Gummow and Hayne JJ).
[375] *Coleman v Power* (2004) 220 CLR 1 at 78 (Gummow and Hayne JJ).
[376] *Coleman v Power* (2004) 220 CLR 1 at 74 (Gummow and Hayne JJ).
[377] *Coleman v Power* (2004) 220 CLR 1 at 79 (Gummow and Hayne JJ).
[378] *Coleman v Power* (2004) 220 CLR 1 at 79 (Gummow and Hayne JJ).

Similarly, Justice Kirby preferred Justices Gummow and Hayne's construction of the offence requiring the insult to intend to, or have a reasonably likelihood, of provoke an unlawful physical retaliation.[379] Interpreted in this way the offence did not to infringe the constitutional freedom defined in *Lange v Australian Broadcasting Corporation*.[380] The result was that the conviction for that offence was not made out and was set aside.[381]

Justice Callinan interpreted the offence as requiring the use of insulting words so that 'the words used must be used, *to a person*'.[382] In contrast to Justices Gummow and Hayne (and Justice Kirby) who interpreted a requirement of an intention, or a reasonable likelihood, of provoking unlawful physical retaliation,[383] Justice Callinan considered the offence only required that there be a '*risk* of provocation'.[384] In the context of the *Lange v Australian Broadcasting Corporation* second test Justice Callinan considered that it was necessary that 'the spoken or written communication be capable of throwing light on government or political matters' and that:

> The 'freedom' is itself a limited one. It relates only to what is necessary for the *effective* operation of government in accordance with the *Constitution*. The implication will not invalidate a law enacted for a legitimate end if it is compatible with the *maintenance* of government or the conduct of a referendum. The last condition, is, with all due respect, somewhat inscrutable. The appreciation of what is reasonably appropriate and adapted to achieving a legitimate end may very much be a matter of opinion. Another formula, using more traditional language, 'is the law a reasonable implementation of a legitimate object' may well have been preferable.[385]

For Justice Callinan the *Vagrants, Gaming and Other Offences Act 1931* (Qld) offence was 'the creature of a responsible and representative parliament' and 'well within the power of the Queensland Parliament to enact'.[386] Thus:

> In short it is *not at all necessary* for the effective operation of the system of representative and responsible government in accordance with the *Constitution* that people go about insulting or abusing one another in or about public places in Queensland.[387]

In specifically dismissing the *Lange v Australian Broadcasting Corporation* second test Justice Callinan considered that that decision imposed a requirement of acting reasonably in a defence to defamation and that the same requirement of acting reasonably should apply to an offence of public disorder.[388] As '[t]hreatening, insulting, or abusive language to a person in a public place is unreasonable conduct' then the *Lange v Australian Broadcasting Corporation* implication 'should not extend to protect that [conduct]'.[389] On this basis Justice Callinan considered the offence was valid and the conviction should stand.[390]

Finally, Justice Heydon interpreted the offence as requiring that the words be insulting and made in a public place and that there was no requirement for conduct intended or reasonably likely to provoke unlawful physical retaliation.[391] Further, Justice Heydon framed the purpose of the office in the context of promoting communications and thus justified as 'reasonably appropriate and adapted

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[379] *Coleman v Power* (2004) 220 CLR 1 at 87 (Kirby J).
[380] *Coleman v Power* (2004) 220 CLR 1 at 91 (Kirby J).
[381] *Coleman v Power* (2004) 220 CLR 1 at 102 (Kirby J).
[382] *Coleman v Power* (2004) 220 CLR 1 at 108 (Callinan J).
[383] *Coleman v Power* (2004) 220 CLR 1 at 74 (Gummow and Hayne JJ), 87 (Kirby J).
[384] *Coleman v Power* (2004) 220 CLR 1 at 108-109 (Callinan J).
[385] *Coleman v Power* (2004) 220 CLR 1 at 110 (Callinan J).
[386] *Coleman v Power* (2004) 220 CLR 1 at 110 (Callinan J).
[387] *Coleman v Power* (2004) 220 CLR 1 at 114 (Callinan J).
[388] *Coleman v Power* (2004) 220 CLR 1 at 114 (Callinan J).
[389] *Coleman v Power* (2004) 220 CLR 1 at 114 (Callinan J).
[390] *Coleman v Power* (2004) 220 CLR 1 at 114-115 (Callinan J). Notably, Justice Callinan later accepts that his reasoning has not been accepted and that he is bound by the decision in *Lange v Australian Broadcasting Corporation* in that it accords with the *Constitution*: see *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 477 (Callinan J).
[391] *Coleman v Power* (2004) 220 CLR 1 at 118 (Heydon J).

to achieving a legitimate end' in the sense of the *Lange v Australian Broadcasting Corporation* second test:[392]

> The goals of [the offence] are directed to 'the preservation of an ordered and democratic society' and 'the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society'. Insulting words are inconsistent with that society and those claims because they are inconsistent with civilised standards. A legislative attempt to increase the standards of civilisation to which citizens must conform in public is legitimate. In promoting civilised standards, [the offence] not only improves the quality of communication on government and political matters by those who might otherwise descend to insults, but it also increases the chance that those who might otherwise have been insulted, and those who might otherwise have heard the insults, will respond to the communications they have heard in a like manner and thereby enhance the quantity and quality of debate. It is correct that the constitutional implication protects not only true, rational and detached communications, but also false, unreasoned and emotional ones. But there is no reason to assume that it automatically protects insulting words by characterising the goal of proscribing them as an illegitimate one (footnotes omitted).[393]

For Justice Heydon, the offence was 'reasonable regulation in the interests of an ordered society' and so 'reasonably appropriate and adapted to the legitimate ends it serves'.[394] As a consequence the offence should not be set aside.[395]

Mulholland v Australian Electoral Commission (2004) 220 CLR 181

Then in *Mulholland v Australian Electoral Commission* (see also ¶3.5.1, p 53) the appellant challenged the provisions in the *Commonwealth Electoral Act 1918* (Cth) that limited registration for elections to political parties (the 500 rule and the no overlap rule).[396] In the circumstances the application of the 500 rule and the no overlap rule would have excluded the appellant's political party from the privileges of being able to request and procure the appearance of the party's name on ballot papers.[397] The appellant argued, in part, that there was a requirement for freedom of communication about government or political matters implied as a consequence of the system of representative (and responsible) government that could be found in the terms and structure of the *Constitution*.[398] According to the appellant's argument, the 500 rule and the no overlap rule directly burdened the constitutional freedom of communication by preventing electors from associating the candidate with their political affiliations.[399] The High Court rejected the appellant's argument.[400]

In addressing the appellant's argument, Chief Justice Gleeson considered that the *Lange v Australian Broadcasting Corporation* formulation was relevant.[401] In the Chief Justice's view, whether the law was 'reasonably appropriate and adapted' to serve 'a legitimate end' that was compatible with representative government was a formula 'to express the limits between legitimate judicial scrutiny, and illegitimate judicial encroachment upon an area of legislative power'.[402] In addressing this formula the Chief Justice considered that the 500 rule and the no overlap rule were options that

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[392] *Coleman v Power* (2004) 220 CLR 1 at 122-127 (Heydon J).
[393] *Coleman v Power* (2004) 220 CLR 1 at 122 (Heydon J).
[394] *Coleman v Power* (2004) 220 CLR 1 at 127 (Heydon J).
[395] *Coleman v Power* (2004) 220 CLR 1 at 127 (Heydon J).
[396] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 186 (Gleeson CJ), 201-202 (McHugh J), 228-229 (Gummow and Hayne JJ), 249 (Kirby J), 280 (Callinan J), 299 (Heydon J).
[397] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 187 (Gleeson CJ), 201-202 (McHugh J), 227-229 (Gummow and Hayne JJ), 250 (Kirby J), 281-283 (Callinan J), 299 (Heydon J).
[398] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 187 (Gleeson CJ), 202 (McHugh J), 244 (Gummow and Hayne JJ), 250 and 274 (Kirby J), 293 (Callinan J), 303 (Heydon J).
[399] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 187 (Gleeson CJ), 202 (McHugh J), 244 (Gummow and Hayne JJ), 274-275 (Kirby J), 297 (Callinan J), 303 (Heydon J).
[400] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 201 (Gleeson CJ), 225 (McHugh J), 249 (Gummow and Hayne JJ), 279 (Kirby J), 297 and 299 (Callinan J), 303 (Heydon J).
[401] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 197 (Gleeson CJ).
[402] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 197 (Gleeson CJ).

were 'open and reasonable' for the Parliament to adopt.[403] Further, the justification of the rules to promote voters voting according to their intentions and establishing a minimum level of public support to justify public funding, respectively, were matters that the 'Court ought to accept as compelling'.[404] As a result, the rules were 'in furtherance and support of a system that facilitates, rather than impedes, political communication and the democratic process' and so should be accepted.[405]

Justice McHugh considered a ballot paper was 'a communication on political and government matters'[406] but that it did 'not burden freedom of communication on political and government matters'.[407] In Justice McHugh view the 500 rule and the no overlap rule did not restrict any 'rights' that were independent of the *Commonwealth Electoral Act 1918* (Cth), and that any obligations for communications on the ballot papers were subject to those entitlements granted by the *Commonwealth Electoral Act 1918* (Cth): 'Proof of a burden on the implied constitutional freedom requires proof that the challenged law burdens a freedom that exists independently of the law'.[408] Justices Gummow, Hayne, Callinan and Heydon adopted a similar approach.[409] Thus, the second limb of the *Lange v Australian Broadcasting Corporation* proposition did not need to be addressed and the consequences of the implication did not need to be resolved,[410] albeit each of the Justices accepted there such an implication was possible.[411]

For Justice Kirby the form of the *Commonwealth Electoral Act 1918* (Cth) burdening the communication was less important than its operation 'in practice and in effect'.[412] Justice Kirby considered that '[t]he Parliament cannot, by stipulating discriminatory preconditions to electoral advantage for incumbent parties, evade the substantive requirements of the *Constitution*'.[413] From his perspective the 500 rule and the no overlap rule did impose a burden, but applying the *Lange v Australian Broadcasting Corporation* second test he concluded they were 'not disproportionate to the attainment of all of the constitutional objectives operating in this context'.[414] In other words, the 500 rule and the no overlap rule were 'reasonably appropriate and adapted'[415] so as:

> … to reduce confusion in the size and form of the ballot paper; to diminish the risk and actuality of deception of electors; to discourage the creation of phoney political parties; and to protect voters against disillusionment with the system of parliamentary democracy, reliant as it so heavily is in Australia on the organisation of political parties.[416]

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[403] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200-201 (Gleeson CJ).
[404] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200-201 (Gleeson CJ).
[405] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 201 (Gleeson CJ).
[406] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 221 (McHugh J).
[407] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 225 (McHugh J).
[408] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 223 (McHugh J). Justice McHugh pointed to his decision in *Levy v Victoria* (1997) 189 CLR 579 at 622: 'The freedom protected by the *Constitution* is not, however, a freedom *to* communicate. It is a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the *Constitution*'.
[409] See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 245-249 (Gummow and Hayne JJ), 298 (Callinan J), 303 (Heydon J). Notably Justice Heydon considered that the 500 rule and the no overlap rule leading to the ballot paper were not a political communication as the ballot paper was merely 'the election machinery' (at 304).
[410] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 225 (McHugh J), 249 (Gummow and Hayne JJ), 298 (Callinan J), 303-304 (Heydon J).
[411] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 217-218 (McHugh J), 244 (Gummow and Hayne JJ), 297-298 (Callinan J), 303-305 (Heydon J).
[412] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 277 (Kirby J).
[413] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 277 (Kirby J).
[414] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 279 (Kirby J).
[415] Notably, Justice Heydon also accepted this proposition, albeit he had already concluded that the *Lange v Australian Broadcasting Corporation* had no application: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 305 (Heydon J).
[416] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 279 (Kirby J).

The relevance of the cases about an implied right to the freedom of communication in government and political matters is that such communication is a necessary corollary to representative (and responsible) government required by the *Constitution*.[417] The result of the various decisions has, however, been to establish that the freedom is practically limited.

APLA Limited v Legal Services Commissioner (NSW) (2005) 224 CLR 322

Thus, in *APLA Limited v Legal Services Commissioner (NSW)* the High Court considered a challenge to lawyers advertising in print and on the internet for "personal injury services" under the restrictions imposed by the *Legal Profession Regulations 2002* (NSW) made under the *Legal Profession Act 1987* (NSW).[418] The plaintiffs contended, in part, that the New South Wales regulations were contrary to the *Constitution* because they infringed the 'freedom of communication on political and governmental' matters guaranteed by the *Constitution* (the implied freedom recognised in *Lange v Australian Broadcasting Corporation*),[419] and that there was similarly 'an implied freedom of communication about legal rights':[420]

> Chapter III [of the *Constitution*], in particular ss 71, 73, 75, 76 and 77, requires for its effective operation that the people of the Commonwealth have the capacity, ability or freedom to ascertain their legal rights and to assert those legal rights before the courts there mentioned. The effective operation of that capacity, ability or freedom requires that they have the capacity or ability or freedom to communicate and particularly to receive such information or assistance as they may reasonably require for that to occur.[421]

The High Court majority rejected *both* these contentions.[422]

Chief Justice Gleeson and Justice Heydon considered that the restriction on advertising was 'an essentially commercial activity' and that was not a communication about 'political and governmental' matters of the type protected by the *Constitution*.[423] Further the *Constitution* in text and structure and judicial power did not 'requir[e] that lawyers must be able to advertise their services'.[424]

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[417] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Langer v Commonwealth* (1996) 186 CLR 302 at 317-319 (Brennan CJ), 324 and 326 (Dawson J), 333-334 (Toohey and Gaudron JJ), 340 (McHugh J), 349-351 (Gummow J); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 298-301 (Mason CJ), 326-328 (Brennan J), 335-338 (Deane J), 360-363 (Dawson J), 378-380 (Toohey J), 387-389 (Gaudron J), 395 (McHugh J); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 231-232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 120-125 (Mason CJ, Toohey and Gaudron JJ), 145-152 (Brennan J), 164-167 (Deane J), 192-193 (Dawson J), 205-207 (McHugh J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 140-142 (Mason CJ), 168-169 (Deane and Toohey JJ), 215-218 (Gaudron J), 227-228 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50-51 (Brennan J), 72-77 (Deane and Toohey JJ).

[418] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 340-341 (Gleeson CJ and Heydon J), 356 (McHugh J), 371-372 and 374 (Gummow J), 412-413 (Kirby J), 448-449 (Hayne J), 463 (Callinan J).

[419] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 345 and 350-351 (Gleeson CJ and Heydon J), 356 and 358 (McHugh J), 374 and 402 (Gummow J), 421 (Kirby J), 449 (Hayne J), 464 and 475-476 (Callinan J).

[420] See *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 345 and 351 (Gleeson CJ and Heydon J), 356 and 358 (McHugh J), 374 and 404 (Gummow J), 421 and 438 (Kirby J), 449 and 451-452 (Hayne J), 464 and 483 (Callinan J).

[421] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 363 (McHugh J).

[422] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 and 352 (Gleeson CJ and Heydon J), 362 (McHugh J), 404 and 412 (Gummow J), 451 and 455 (Hayne J), 481 and 486 (Callinan J). Noting that Justice McHugh rejected the plaintiffs' contentions about the implied freedom recognised in *Lange v Australian Broadcasting Corporation* about political and governmental matters but accepted aspects of their contentions about 'an implied freedom of communication about legal rights' as it related to the federal jurisdiction, and Justice Kirby did not address the plaintiffs' contentions about the implied freedom recognised in *Lange v Australian Broadcasting Corporation* about political and governmental matters.

[423] 'They are, however, drawing a long bow when they claim that restricting their capacity to advertise for business is incompatible with the requirements of responsible and representative government established by the *Constitution*': *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 (Gleeson CJ and Heydon J).

[424] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 352 (Gleeson CJ and Heydon J).

Justice McHugh rejected this proposition that while there was some reference to politicians in the offending publications,[425] this was sufficient for the communication to 'concern political or governmental matters'.[426] Justice McHugh suggested the *Lange v Australian Broadcasting Corporation* decision needed to be confined to its context, giving effect to the requirements of direct elections for the Senate and the House of Representatives.[427] Justice McHugh accepted that the reference to the politicians *did* concern a political matter but considered that it '[wa]s not so intertwined with non-protected matter that it cannot be severed from it'.[428] The result was the impugned regulation could validly apply to those parts of the advertisements not making reference to the politicians.[429] Meanwhile, Justice McHugh considered that 'the provision of legal advice and information concerning federal law should be seen as indispensable to the exercise of the judicial power of the Commonwealth and protected by Ch III rather than the freedom identified' in *Lange v Australian Broadcasting Corporation*.[430] The result was to determine the matter from the perspective of the judicial power of the Commonwealth protected by Ch III of the *Constitution*, and from this perspective Justice McHugh considered the regulations were invalid to the extent they concerned 'causes of action in federal jurisdictions'.[431]

Justice Gummow considered that some reference to politicians in the offending publications did 'not deny to the balance [of the communication] the character of an advertisement' and that this was not protected according to the *Lange v Australian Broadcasting Corporation* formulation.[432] That is, the regulation did not 'effectively burden freedom of communication about government or political matters either in its terms, operation or effect' albeit the communication addressed 'politically controversial' matters.[433] Justice Gummow also rejected the plaintiffs' contentions about 'an implied freedom of communication about legal rights' finding the question to be addressed within the ambit of Ch III of the *Constitution*.[434] The result was to find the plaintiffs' contentions were not made out.[435]

Similarly, Justice Hayne rejected the plaintiffs' contentions about the 'freedom of communication on political and governmental' matters guaranteed by the *Constitution*.[436] Justice Hayne considered that the communications were not about 'government or political matters' but rather the rights and remedies about which legal services might be provided, albeit these might involve 'political controversy and debate' about personal injury litigation.[437] Usefully, Justice Hayne stated:

> The implied freedom of political communication is a limitation on legislative power; it is not an individual right. It follows that, in deciding whether the freedom has been infringed, the central question is what the impugned law does, not how an individual might want to construct a particular communication or (in this case) advertisement.[438]

The consequence was that an advertisement that referred to politicians saying 'that "[d]espite the best efforts of Premier Bob Carr and Senator Helen Coonan to stop you, you may still have legal

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[425] 'One publication, for example, refers to efforts of "Premier Bob Carr and Senator Helen Coonan" to stop the recipient of the publication from accessing "legal rights to compensation for" injuries "at work, by a defective product or on defective premises"': *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 359 (McHugh J).
[426] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 359-361 (McHugh J).
[427] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 360-361 (McHugh J).
[428] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 362 (McHugh J).
[429] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 362 (McHugh J).
[430] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 367 (McHugh J).
[431] See *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 367-370 (McHugh J).
[432] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 403-404 (Gummow J).
[433] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 403-404 (Gummow J) citing *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 329 (Brennan J).
[434] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 404-412 (Gummow J).
[435] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 412 (Gummow J).
[436] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 449 (Hayne J).
[437] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 449-451 (Hayne J) referring to *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 329 (Brennan J).
[438] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 451 (Hayne J).

rights to compensation" for personal injury', enabled an argument to be constructed as 'an advertisement which was to be understood as also making a political point'.[439] This was, however, not sufficient:

> … demonstrating that an advertisement which contravenes the impugned regulations can be constructed in a way that contains political commentary, does not show that the regulations constitute a burden on the freedom of communication about government or political matters. The political point can be made if it is shorn of reference to the subjects with which the impugned regulations deal.[440]

Justice Hayne also rejected the plaintiffs' contentions about an implied freedom of communication about legal rights, as '[n]either the text nor the structure of the *Constitution* supports such an implication'.[441]

Justice Callinan considered that there were limits to what constituted political matters and to be within the *Lange v Australian Broadcasting Corporation* 'a government or political matter must, in effect, be of real significance to the election of parliamentarians, or the maintenance of responsible and representative government, or the conduct of a referendum pursuant to s 128 of the *Constitution*'.[442] As '[n]one of the communications proposed, or indeed anything like them, answer any acceptable practical description or definition of a government or political matter'[443] they were not protected and the regulation was valid.[444] Justice Callinan also rejected then plaintiffs' contention that there was any form of implied freedom and 'do nothing to detract from the effective operation of Ch III of the *Constitution*'.[445]

In contrast to Chief Justice Gleeson and Justices Gummow, Hayne, Callinan and Heydon rejection of 'an implied freedom of communication about legal rights',[446] Justice Kirby considered that the freedom had a broader operation:[447]

> In short, just as lawmakers (including judges expressing the common law) cannot impede communication disproportionately so as to undermine the contemplated operations of a representative democracy and accountable executive expressed and implied in the institutions referred to in Ch I and Ch II of the *Constitution*, so they cannot impede the level of communication essential to the operation of the Judicature provided for in Ch III. Even if this Court were to confine [*Lange v Australian Broadcasting Corporation*] to a principle protective of communications about the legislature and the executive, a separate implication of similar or identical scope would arise to protect communications necessary to the operation of the Judicature provided for in Ch III of the *Constitution*. That operation cannot validly be obstructed by State or federal law (footnote omitted).[448]

The problem remains in characterising the terms, operation or effect of the legislation as a 'political' or 'government' matter.[449] As *APLA Limited v Legal Services Commissioner (NSW)* (and other cases)[450] demonstrates, the implied freedom *only* applies in respect of the validity of legislation about matters significantly connected with the choice and representation by members of the Senate and House of Representatives.

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[439] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 451 (Hayne J).
[440] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 451 (Hayne J).
[441] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 452 (Hayne J).
[442] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 478 (Callinan J).
[443] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 478 (Callinan J).
[444] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 480-481 (Callinan J).
[445] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 486 (Callinan J).
[446] See *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 352 (Gleeson CJ and Heydon J), 412 (Gummow J), 455 (Hayne J), 486 (Callinan J).
[447] See also *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 298-299 (Mason CJ).
[448] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 441 (Kirby J).
[449] See *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 361 (McHugh J); *Coleman v Power* (2004) 220 CLR 1 at 30-31 (Gleeson CJ).
[450] See, for example, *Cunliffe v Commonwealth* (1994) 182 CLR 272 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

3.5.3 Meaning and content of 'representative government (or democracy)'

As the survey of cases demonstrates the meaning and content of 'representative government (or democracy)' remains uncertain even though it is clear that the *Constitution* does give effect to the institution according to the text and structure of the *Constitution*.[451] In short, there is no general implication (guarantee) of 'representation',[452] albeit certain standards have been established (and they appear to be evolving):[453]

(a) Members of the Senate must be 'directly chose by the people of the State' at periodic elections.[454]

(b) Members of the House of Representatives must be 'directly chose by the people of the Commonwealth' at periodic elections.[455]

(c) Equal electorates and equal vote value are not required,[456] although this is a matter of degree in the particular circumstances.[457]

(d) The 'directly chosen' requires a direct popular election (as opposed to indirect election such as an electoral college),[458] and allows voters to be excluded where the exclusions are not arbitrary or disproportionate.[459]

(e) The election requires a genuine choice.[460]

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[451] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Levy v State of Victoria* (1997) 189 CLR 579 at 606 (Dawson J); *McGinty v Western Australia* (1996) 186 CLR 140 at 168 (Brennan CJ), 182-183 (Dawson J), 231 (McHugh J), 284-285 (Gummow J).

[452] See *McGinty v Western Australia* (1996) 186 CLR 140 at 169 (Brennan CJ), 182 (Dawson J), 229-230 (McHugh J). See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[453] Noting, of course, the ever present split between formal legalism and the appeal to extrinsic sources in constitutional law: see, for an example among many, the division between the majority (Gleeson CJ, Gummow, Kirby and Crennan JJ) and others (Hayne and Heydon JJ) in *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 (Gleeson CJ), 186-187 (Gummow, Kirby and Crennan JJ), 215 (Hayne J), 223 (Heydon J).

[454] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 (Dixon CJ, McTiernan, Webb and Kitto JJ) providing: 'what they require is a relevance to or connection with the subject assigned to the Commonwealth Parliament … every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to *effectuate* its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter' (emphasis added).

[455] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 (Dixon CJ, McTiernan, Webb and Kitto JJ).

[456] *McGinty v Western Australia* (1996) 186 CLR 140 at 175-176 (Brennan CJ), 189 (Dawson J), 230 (McHugh J), 293-294 and 300 (Gummow J); *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 33 (Barwick CJ), 38-39 (McTiernan and Jacobs J), 47-48 (Gibbs J), 60 (Stephen J), 61-62 (Mason J).

[457] See *McGinty v Western Australia* (1996) 186 CLR 140 at 214-215 (Toohey J), 223, (Gaudron J), 286-287 (Gummow J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72 (Deane and Toohey JJ); *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 25-26 (Barwick CJ), 35-36 (McTiernan and Jacobs JJ), 44 (Gibbs J), 57-58 (Stephen J), 61 (Mason J). See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 194 (Gleeson CJ), 217 (McHugh J), 237-238 (Gummow and Hayne JJ), 257-258 (Kirby J).

[458] See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206 (McHugh J) citing *Muldowney v South Australia* (1996) 186 CLR 352 at 370-371 (Dawson J); *McGinty v Western Australia* (1996) 186 CLR 140 at 180-181 (Dawson J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 201 (McHugh J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 137 (Mason CJ), 184 (Dawson J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 71-72 (Deane and Toohey JJ).

[459] See *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 (Gleeson CJ), 202 (Gummow, Kirby and Crennan JJ).

[460] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206 and 214 (McHugh J); *McGinty v Western Australia* (1996) 186 CLR 140 at 170 (Brennan CJ), 181 (Dawson J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 189-190 (Dawson J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 230-231 (McHugh J).

(f) The election requires an informed choice (including freedom of communication on matters of government and politics as 'to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*').[461]

(g) For a law to infringe the 'freedom of communication about government or political matters' it must effectively burden that freedom in its terms, operation or effect.[462]

(h) How broadly the 'freedom of communication about government or political matters' reaches remains uncertain,[463] albeit it is limited:[464] 'It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*'.[465]

Perhaps, the matter is best summed up according to Justice McHugh's conception in *Theophanous v Herald & Weekly Times Ltd* – a minimum requirement that the 'people' are 'governed by representatives elected in free elections by those eligible to vote'.[466] The constitutional scheme leaves it almost completely to Parliament to determine the form of election and the eligibility of the voters. Such a scheme must, however, be within the bounds of the *Constitution*:

> To the extent that the requirements of freedom of communication is an implication drawn from ss 7, 24, 64, 128 and related sections of the *Constitution*, the implication can validly extend only so far as is necessary to give effect to these sections. Although some statements in the earlier cases might be thought to suggest otherwise, when they are properly understood, they should be seen as purporting to give effect only to what is inherent in the text and structure of the *Constitution*.[467]

Significantly, however, these cases demonstrate that there is an implication to be drawn from the text and structure of the *Constitution* in the context of 'representative government (or democracy)'. While the content of this implication has been addressed in the communication cases, there seems at least some prospect of arguments that there may also be other relevant implication to be made to deliver 'representative government (or democracy)'. The 'text and structure' of the *Constitution* is open to considerable taking account of, or giving effect to, 'representative government (or democracy)'.[468] While presently quiet, there is considerable potential for conceptions of

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[461] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 195 (Gleeson CJ), 218 (McHugh J), 244 (Gummow and Hayne JJ), 274 (Kirby J), 297-298 (Callinan J), 303-305 (Heydon J); *Coleman v Power* (2004) 220 CLR 1 at 30 and 32 (Gleeson CJ), 43 (McHugh J), 77-78 (Gummow and Hayne JJ), 82 (Kirby J), 109 (Callinan J), 120 (Heydon J); *Levy v Victoria* (1997) 189 CLR 579 at 599 (Brennan CJ), 609 (Dawson J), 615 (Toohey and Gummow JJ), 620 (Gaudron J), 627-628 (McHugh J), 648 (Kirby J).

[462] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 (Gleeson CJ and Heydon J).

[463] See *Coleman v Power* (2004) 220 CLR 1 at 30-31 (Gleeson CJ), 49-50 (McHugh J), 82 (Kirby J), 110 (Callinan J), 123-124 (Heydon J). See also Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668.

[464] See *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 350-351 (Gleeson CJ and Heydon J), 360-362 (McHugh J), 402 (Gummow J), 451 (Hayne J), 477 (Callinan J); *Coleman v Power* (2004) 220 CLR 1 at 49-50 (McHugh J), 77 (Gummow and Hayne JJ), 110 (Callinan J), 121 (Heydon J).

[465] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[466] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 201 (McHugh J). See also *McGinty v Western Australia* (1996) 186 CLR 140 at 182 (Dawson J); *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 56 (Stephen J).

[467] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[468] See, for example, Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24 and the references therein.

'representative government (or democracy)' to re-shape the mode and form of exercising executive power. With the majority in *Rowe v Electoral Commissioner* demonstrating that the High Court is divided over the extent to which Parliament can determine the boundaries of a sufficient entitlement to vote.[469] Perhaps the most significant advance in this case was the articulation of a 'proportionality' standard.[470]

3.6 The significance of 'executive' concepts

The foregoing analysis shows that the key executive 'concepts' of the 'rule of law', the 'separation of powers', 'responsible government' and 'representative government (or democracy)' provide a useful means of articulating aspirations about the ways executive power might be exercised and then held accountable, responsible and transparent. In practice, however, these concepts are evolving and changing. This is perhaps best captured by Keith Mason's understanding of the 'rule of law':

> In reality the idea of the rule of law is a complex mix of fundamental ethical and political principles. These are necessarily influenced by changing values, and in turn they influence those who exercise authority in our society, most notably the judges.[471]

Most importantly, however, the Executive is constrained by these aspirational concepts that are not detailed in the *Constitution* but rather 'divined', and while they may be promoted as rigorous constitutional limits delivering accountability, responsibility and transparency, they do not fulfil that function as might be expected. The analysis demonstrates that the concepts are not settled, but rather evolving, mutable and often verging on mere platitudes. At its most extreme these concepts are subversive and open to misuse as the High Court's decision in *Rowe v Electoral Commissioner* demonstrate (albeit the outcome in the case might have been desirable):

> 'Representative government' was regarded by many nineteenth century writers as 'the Ideally Best Form of Government'. Their works were familiar to the framers of the Constitution and to those in the Parliament who debated the Bill for what became the *Commonwealth Electoral Act 1902* (Cth) ('the 1902 Act'). The enduring controversies about electoral systems (reflected, for example, in the application of the Hare-Clark system in Tasmania) as well as the course of debates in the Parliament in connection with the Bill for the 1902 Act show, however, that no one writer's views about representative democracy were seen as commanding the field. It is not right in those circumstances to see the provisions of Ch I of the *Constitution*, with their important but spare specification of the system of government, as embracing the views of any one of those writers, be it John Stuart Mill or anyone else. To read Ch I in that way denies the evident constitutional intention to permit the Parliament to decide many important questions about the structure and content of the electoral system without constitutional restriction beyond the requirement that each House be directly chosen by the people. To assume otherwise is, as Gibbs J said in *McKinlay*, to beg the question and ignore history, or it is, as his Honour also said, to add to the *Constitution*'s provisions 'new doctrines which may happen to conform to our own prepossessions' (footnotes omitted).[472]

Thus, appeals to these generalised concepts (for example, 'common understanding' or 'generally accepted Australian standards' in the 'representative government (or democracy)' cases)[473] are not a solid basis for either justifying the exercise of executive powers or imposing limitations. The solution might be a series of normative analyses assessing the aspirational boundaries and reducing them to useful and applicable rules in clear and easy to understand text. Such analyses would be useful. In the meantime, however, these concepts are an everpresent argument available to legal advisers' crafing a postion to justify or deny a particular preferred position. As such they are central to understanding the potential scope for regulating executive power.

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[469] *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010) at [79] (French CJ), [167]-[168] (Gummow and Bell JJ), [384]-[385] (Crennan J).

[470] See *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010) at [456]-[466] (Kiefel J).

[471] Keith Mason, 'The Rule of Law' in Paul Finn (ed), *Essays on Law and Government, Volume 1 Principles and Values* (1995) p 115.

[472] *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010) at [204] (Hayne J) citing *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 44 and 45 (Gibbs J).

[473] See, for example, *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 218-220 (Hayne J).

4. Executive institutions and personalities

4.1 Introduction

The *Constitution* is the foundation of the institutions of the Executive, the source of powers conferred on and exercised by the Executive, and the source of some of the directions about how those powers might be exercised. The Executive is accordingly confined to acting within the bounds of the *Constitution* and what the *Constitution* will permit.[1] The *Constitution* confers 'executive power' through the 'Governor-General'[2] as the Queen's representative.[3] The *Constitution* s 61 provides:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.

A 'Federal Executive Council' (or 'Governor-General in Council') is established to 'advise' the 'Governor General'.[4] The *Constitution* s 62 provides:

> There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

In the practice of 'responsible government', however, the authority to 'advise' is a power conferred on the 'Federal Executive Council' to *exercise* the executive powers under the *Constitution* according to the expressed values of the community that have been resolved through parliamentary politics.[5] The 'Federal Executive Council' must include every 'Minister of State'[6] and may include others.[7] The 'Ministers of State' (including those designated as Parliamentary Secretaries)[8] are appointed by the Governor-General on the advice of the Prime Minister.[9] The Governor-General, again on the advice of the Prime Minister, establishes Departments of State and formally allocates Executive responsibility among Ministers and Parliamentary Secretaries through the *Administrative Arrangements Order*.[10] Ministers and Parliamentary Secretaries swear a declaration before the Governor-General to administer the Department of State in the portfolio area to which they have been appointed.[11]

In short, the executive powers to administer the laws and institutions of the Crown (the legal personality of the State) under the *Constitution* are exercised by Ministers as heads of departments

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[1] See, for example, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 183-188 (Dixon J), 211-212 (McTiernan J), 230-232 (Williams J), 266 (Fullagar J), 283 (Kitto J). As a consequence executive power is limited to the Commonwealth's authority under the *Constitution* with its limitations imposed by the substantive content matters (such as that interstate trade be absolutely free: s 92), subject matters (such as the enumerated legislative powers: s 51) and constitutional implications (such as intergovernmental immunities and the implied freedom of political communications), and the extensions where allowed (such as the 'nationhood' powers).

[2] *Constitution* s 2. Although the Crown may exercise certain constitutional powers when present in Australia: see *Royal Powers Act 1953* (Cth) s 2.

[3] *Constitution* s 61. Notably, this is the powers of the Crown in right of the Commonwealth.

[4] *Constitution* s 62.

[5] Noting, of course, that the 'Governor-General in Council' acts with the advice of the 'Federal Executive Council' being the exercise of those powers and functions that do not include the prerogative powers of the Crown and only those powers exercisable by the Crown in right of the Commonwealth. See *Constitution* s 62; *Acts Interpretation Act 1901* (Cth) s 16A. In practice the Queen and Governor-General rely on the advice except when exercising the 'reserve powers'.

[6] *Constitution* s 64.

[7] *Constitution* s 62. According to practice those appointed remain executive councillors for life (adopting the title 'Honourable'), although only those executive councillors who are members of the current ministry are summoned to advise the Governor-General: see Federal Executive Council Secretariat, *Federal Executive Council Handbook* (2009) p 3. See also Prime Minister, *A Guide on Key Elements of Ministerial Responsibility* (1998) p 8.

[8] See *Ministers of State Act 1952* (Cth) s 4.

[9] *Constitution* s 64.

[10] *Constitution* s 64. See *Administrative Arrangements Order*, 14 October 2010, pt 15.

[11] Federal Executive Council Secretariat, *Federal Executive Council Handbook* (2009) p 3.

directing the work of public servants (collectively termed the 'Australian Government'). The Ministers, and through the Minister the public servants, remain responsible to the (representative) Parliament and must comply with the Parliament's directions set out in the laws and other instruments made by the Parliament. More importantly, however, the Ministers further select a portion of their number to form a 'Cabinet' (or even an 'inner Cabinet') headed by the 'Prime Minister' that, in effect, exercise the executive powers of the Commonwealth. The only exceptions to this scheme are the powers exercisable by the Governor-General without reference to, or advice from, the Prime Minister (the 'reserve powers').[12]

The content of the executive power conferred by the *Constitution* is that set out in the *Constitution*, in statutes that are made by Parliament (or their authorised delegates)[13] within the *Constitution*'s powers (the exercise of ordinary statutory power), in conventions and prerogatives ('Crown prerogatives'), *and* the non-statutory prerogative powers (the 'Executive prerogatives').[14] This chapter addresses some of the key Executive institutions involved in the exercise of executive power, such as the Crown, the Governor-General, the Cabinet, the Ministers, and so on. The purpose is to provide a foundation for appreciating and understanding the limitations of the institutions that assert executive power by and under the *Constitution*.

4.2 The Crown

At its most simple the 'Crown' refers to the Queen as part of the Parliament,[15] the holder of executive power,[16] and the ultimate avenue of appeal[17] invested with legal personality as a distinct body politic.[18] In Australia this is 'Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth'[19] and the Queen's 'heirs and successors in the sovereignty of the United Kingdom'.[20] By the operation of the *Statute of Westminster Adoption Act 1942* (Cth)[21] the succession is most probably now confined to the heirs of the body of Princess Sophia (Electress of Hanover), the granddaughter of James I addressed in the *Act of Settlement 1700* (Eng)[22] and the *Act of Union 1706* (UK) (also called the *Union with Scotland Act 1906*

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12 Theoretically there are powers that may be exercised by the Queen, although in practice the Queen does not exercise these powers, such as to appoint the Governor-General (*Constitution* s 2), disallow Acts of Parliament (*Constitution* s 59), exercise Executive power (*Constitution* s 61), and so on:

13 These include the various instruments like regulations, determinations, and so on, made by others and often approved by Parliament: see *Legislative Instruments Act 2003* (Cth) ss 42 and 44.

14 These latter 'Executive prerogatives' powers differ from the *other* Crown prerogative powers in that they are exercised by Ministers and other senior members of the Executive, albeit in a historical sense, they are all traceable to the Royal power and authority vested in the Queen as the supreme Executive authority. Thus, the distinction between 'Crown prerogatives' and 'Executive prerogatives' is really a distinction that aids understanding, rather than a clear separation applied to prerogatives: see *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 321 (Evatt J). These 'Executive prerogatives' include the power to declare war, the power to sign treaties, the power to appoint ambassadors and High Commissioners, the powers of the Attorney-General as the First Law Officer of the Crown, and so on (addressed further in the next chapter).

15 *Constitution* s 1.

16 *Constitution* s 61.

17 *Constitution* s 74. Notably this has been redressed to some degree according to the *Privy Council (Limitation of Appeals) Act 1968* (Cth) s 4 and *Privy Council (Appeals from the High Court) Act 1975* (Cth) s 3.

18 See *Sue v Hill* (1999) 199 CLR 462 at 497 (Gleeson CJ, Gummow and Hayne JJ). See also *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 (Gleeson CH, Gummow and Hayne JJ); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 185-186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

19 *Royal Style and Titles Act 1973* (Cth) s 2 and sch. An important theoretical consideration is that the reference to 'Queen of Australia' suggests an independence from the 'Queen of Great Britain and Northern Ireland', although how separate remains unclear and might be tested were there to be for the Realm of the 'Queen of Great Britain and Northern Ireland' an abdication, a Regent appointed, and so on. The solution might be that the Australian Parliament passes separate legislation appointing a successor, Regent, and so on.

20 *Commonwealth of Australia Constitution Act* (UK) s 2. See also *Sue v Hill* (1999) 199 CLR 462 at 502 (Gleeson CJ, Gummow and Hayne JJ).

21 See *Statute of Westminster Adoption Act 1942* (Cth) s 3 and sch (Preamble).

22 *Act of Settlement 1700* 12&13 Will 3 c 2 (England).

(UK)),[23] and excluding the descendants of the Duke of Windsor who abdicated the English throne on 11 December 1936.[24] Importantly, the demise of the Crown does not affect the status of the 'Crown' in the dissolution of Parliament, the ongoing officers of the Crown and legal proceedings because of the statutory basis of the Australian executives.[25] The key point is that the title of the 'Crown' in Australia descends automatically and seamlessly to the rightful heir on the demise of the reigning 'Crown'.[26]

The conception of the 'Crown', however, is more complex, their being uncertainty about the particular emanation of the 'Crown' in a particular context.[27] Accordingly, the 'Crown' might be considered in different senses:[28] (1) the body politic;[29] (2) the international personality of that body politic;[30] and (3) the Executive branch of government, represented by the Ministry and the administrative bureaucracy which attends to the business of government;[31] (4) the paramount powers of the parent state (the United Kingdom of Great Britain and Northern Ireland) in relation to its dependencies;[32] and (5) the person occupying the hereditary office of Sovereign of the United Kingdom under rules of succession established in the United Kingdom.[33] The result is that care needs to be taken in addressing the particular meaning of the 'Crown' in the particular context, and in addressing executive power, the term 'Crown' is generally synonymous with government 'represented by the Ministry and the administrative bureaucracy which attends to its business'.[34]

4.2.1 Powers of the 'Queen'

The *Constitution* confers some powers directly upon the Queen, some of which may be exercised personally[35] and the others that may be exercised by the Governor-General on behalf of the Queen.[36] Theoretically there may be other powers exercisable by the Queen[37] and some powers

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[23] *Act of Union 1706* 5 Anne c 8 (UK).

[24] See *Abdication Act 1936* (UK) s 1(2). See also *Commonwealth v Queensland* (1975) 134 CLR 298 for some of the discussion about the effect of the changes reflected in the *Royal Style and Titles Act 1973* (Cth) on the relationship between the Crown and the States, albeit the legislation did not have any effect: see *South Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 at 261 (Gibbs J). See also Harold Renfree, *The Executive Power of the Commonwealth of Australia* (1984) pp 12-14; Damien Freeman, 'The Queen and Her Dominion Successors: The Law of Succession to the Throne in Australia and the Commonwealth of Nations' (2002) 4 *Constitutional Law and Policy Review* 28; Enid Campbell, 'Changing the Rules of Succession to the Throne' (1999) 1 *Constitutional Law and Policy Review* 67; CD O'Farran, 'The Law of the Accession' (1953) 16 *Modern Law Review* 140; EH Coghill, 'The King-Marriage and Abdication' (1937) 10 *Australian Law Journal* 393.

[25] See Editors, 'Demise of the Crown' (1952) 25 *Australian Law Journal* 633 at 633-634. See also, for examples, *Demise of the Crown Act 1901* (UK) s 1(1); *Constitution* s 5; *Constitution Act 1975* (Vic) s 9 (Parliament not dissolved); *Constitution of Queensland 2001* (Qld) s 80 (maintenance of offices); *Constitution Act 1975* (Vic) s 11(2) (legal proceedings continue).

[26] See *Calvin's Case* (1608) 7 Co. Rep 1a. Notably the succession may not be justiciable: see *Hall v Hall* (1944) 88 SJ 383 (Hereford CC). See also Editors, 'Demise of the Crown' (1952) 25 *Australian Law Journal* 633 at 634.

[27] Compare *Constitution* ss 75(iii), (iv) and (v). See also *Sue v Hill* (1999) 199 CLR 462 at 497-503 (Gleeson CJ, Gummow and Hayne JJ) for the different senses in the meaning of the phrase 'the Crown'. See also Inglis Clark, *Studies in Australian Constitutional Law* (1901) pp 65-66.

[28] See *Sue v Hill* (1999) 199 CLR 462 at 497-500 and 502 (Gleeson CJ, Gummow and Hayne JJ). See also Harold Renfree, *The Executive Power of the Commonwealth of Australia* (1984) pp 14-15.

[29] *Constitution* ss 1 (a part of Parliament) and 61 (the holder of Executive power).

[30] *Commonwealth of Australia Constitution Act* (UK) Preamble; *Constitution* ss 2 (Head of State), 64 (Head of the Executive) and 68 (commander of naval and military forces).

[31] *Constitution* ss 61 (the holder of Executive power) and 64 (Queen's Ministers).

[32] *Commonwealth of Australia Constitution Act* (UK) Preamble.

[33] *Commonwealth of Australia Constitution Act* (UK) s 2.

[34] *Sue v Hill* (1999) 199 CLR 462 at 499 (Gleeson CJ, Gummow and Hayne JJ).

[35] See *Constitution* ss 2 (appoint the Governor-General), 3 (paying the Governor-General), 4 (appoint persons to 'administer the Government of the Commonwealth'), 58 (assenting to referred Bills), 59 (disallow a law), 66 (paying the Ministers), 74 (granting appeals in limited circumstances), 122 (placing territories under authority), 126 (authorising the Governor-General to appoint deputies) and 128 (assenting to alterations to the *Constitution*).

[36] See *Constitution* ss 2 (Queen's representative exercising her assigned powers and functions), 61 (exercising Executive power), 68 (command of naval and military forces) and 126 (appoint deputies).

[37] Notably, one perspective about the limited role for the Queen under the *Constitution* was that because the concept of 'responsible government' was enshrined in the *Constitution*, the constitutional drafters focused on the theoretical expression of the Crown's powers rather than their actual detail so as to avoid appearing ignorant of British

exercised by both the Queen and the Governor-General.[38] In practice, the only powers actually exercised by the Queen in person are the appointment of the Governor-General and various other appointments,[39] and in each case, on the advice of her Australian Ministers.[40] This reflects the adoption of the *Royal Style and Titles Act 1973* (Cth) that was 'a formal recognition of the changes that had occurred in the constitutional relations between the United Kingdom and Australia',[41] and specifically, that the Queen would be advised by Ministers of the Commonwealth and not by British Ministers.[42] The Queen's other personal powers to assent to legislation reserved by the Governor-General for the Queen's assent[43] and disallow laws assented to by the Governor-General[44] are potentially still exercisable,[45] although in practice these are likely only to be exercised symbolically and only exercised on the advice of Australian Ministers.[46]

Statute law has also expanded the powers exercisable by the Governor-General, so that that office now has wider powers than the Queen as 'Crown'. To address this particular problem when the Queen visits Australia and seeks to exercise all the powers of the Governor-General, the *Royal Powers Act 1953* (Cth) empowers the Queen when in Australia to exercise 'any power under an Act exercisable by the Governor-General' and for constitutional functions.[47]

4.2.2 'Crown in right of the Commonwealth'

The main problems arise in determining the scope and divisibility of authority of the 'Crown in right of the Commonwealth' and the 'Crown in right of the State', as it is the same 'Crown' exercising powers in both the State jurisdictions and any of that jurisdiction conferred on the Commonwealth as a consequence of the *Constitution*:[48]

> WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland …[49]

The divisibility of the 'Crown in right of the Commonwealth' from the theoretically indivisible 'Crown in right of the United Kingdom and Ireland'[50] traces to the independence established by the

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constitutional practice, on the understanding that 'no constitutional lawyer could suggest for a moment that the powers conferred on the Governor-General were to be taken literally': George Winterton, *Parliament, The Executive and the Governor-General: A Constitutional Analysis* (1983) pp 2-5 (suggesting this was 'a serious and dangerous mistake, which sowed the seeds for future constitutional conflict').

38 For example, the *Constitution* s 61 provides that '[t]he executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative' leaving open the prospect on the construction of the text that the Queen may also exercise the same 'executive power'.

39 See, for example, *Constitution* s 2; Commonwealth of Australia, *Gazette*, No S181, 10 September 2008.

40 *Sue v Hill* (1999) 199 CLR 462 at 496 (Gleeson CJ, Gummow and Hayne JJ); *New South Wales v Commonwealth* (1975) 135 CLR 337 at 365 (Barwick CJ). See also Bill Hayden, *Hayden: An Autobiography* (1996) p 549.

41 *South Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 at 261; (Gibbs J). See also *Sue v Hill* (1999) 199 CLR 462 at 496 (Gleeson CJ, Gummow and Hayne JJ).

42 See *Sue v Hill* (1999) 199 CLR 462 at 496 (Gleeson CJ, Gummow and Hayne JJ) and the references therein.

43 *Constitution* s 58.

44 *Constitution* s 59.

45 See, for examples, Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) p 83 (noting that the Executive might advise the Queen to disallow a law that the Parliament might not otherwise repeal); W Harrison Moore, *Constitution of the Commonwealth of Australia* (2nd ed, 1910) p 110.

46 See Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) p 83; George Winterton, *Parliament, The Executive and the Governor-General: A Constitutional Analysis* (1983) pp 19-22. See also *Attorney-General (Cth) v T & G Mutual Life Society Ltd* (1978) 144 CLR 161 at 195-197 (Aickin J).

47 *Royal Powers Act 1953* (Cth) s 2.

48 See WE Cuppaidge, 'The Divisibility of the Crown' (1954) 27 *Australian Law Journal* 594. See also John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 701-702. See also Anne Twomey, 'Responsible Government and the Divisibility of the Crown' [2008] *Public Law* 742.

49 *Commonwealth of Australia Constitution Act* (UK) Preamble.

50 The indivisibility of the Crown was asserted by the early High Court: see, for example, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152 (Knox CJ, Isaacs, Rich and Starke JJ).

Statute of Westminster 1931 (UK)[51] and formally adopted by the Commonwealth through the *Statute of Westminster Adoption Act 1942* (Cth).[52] The position of the 'Crown in right of the States' was clarified by the *Australia Act 1986* (Cth) providing that the 'Crown' in the United Kingdom and Ireland is separate and divisible from the Australian 'Crown'.[53] In Australia, the 'Queen of Australia' as the 'Crown' is represented by the Governor-General for the Commonwealth and the various Governors for the States, so that the Crown's 'legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law, or the statute law there binding the Crown'.[54] The powers associated with each of these emanations of the 'Crown' are derived from the prerogatives of the Crown and the various statutory and like instruments conferring powers on the Crown according to those locales[55] – 'we have not one but effectively seven monarchies'.[56]

4.2.3 Statutory prescriptions

To avoid some of the confusion in referring to the 'Crown' in its various conceptions in legislation,[57] Commonwealth legislation has attempted to clarify any references to the 'Crown'.[58] Thus, the *Acts Interpretation Act 1901* (Cth) s 16 provides:

> In any Act references to the Sovereign reigning at the time of the passing of such Act, or to the Crown, shall unless the contrary intention appears be construed as references to the Sovereign for the time being.

The will also include an 'office of the Commonwealth', the *Acts Interpretation Act 1901* (Cth) providing:

> **21 Office etc. means office etc. of the Commonwealth**
> (1) In any Act, unless the contrary intention appears:
> (a) references to any officer or office shall be construed as references to such officer or office in and for the Commonwealth; and

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[51] *Statute of Westminster 1931* (UK) 22 & 23 Geo 5 c 4 (Imp).

[52] *Statute of Westminster Adoption Act 1942* (Cth) s 3. See also *Southern Centre of Theosophy Incorporated v South Australia* (1979) 145 CLR 246 at 257 (Gibbs J), 252 (Barwick CJ), 261 (Stephen J), 261 (Mason J), 264-265 (Aickin J), 265 (Wilson J); *Sue v Hill* (1999) 199 CLR 462 at 501-502 (Gleeson CJ, Gummow and Hayne JJ), 525-527 (Gaudron J); *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ). For a contrary perspective see George Winterton, 'The Evolution of a Separate Australian Crown' (1993) 19 *Monash University Law Review* 1 at 16-21; Greg Craven, 'The Constitutional Minefield of Australian Republicanism' (1992) 8(3) *Policy* 33 at 34-35.

[53] *Australia Act 1986* (Cth) ss 7 and 13. See *Sue v Hill* (1999) 199 CLR 462 at 494 (Gleeson CJ, Gummow and Hayne JJ). See also *R v Foreign Secretary ex parte Indian Association of Alberta* [1982] 1 QB 892 at 928 (May LJ) stating: '[a]lthough at one time it was correct to describe the Crown as one and indivisible, with the development of the Commonwealth this is no longer so. Although there is only one person who is the Sovereign within the British Commonwealth, it is now a truism that in matters of law and government the Queen of the United Kingdom, for example, is entirely independent and distinct from the Queen of Canada. Further, the Crown is a constitutional monarchy and thus when one speaks today, and as was frequently done in the course of the argument on this application, of the Crown 'in right of Canada' or of some other territory within the Commonwealth, this is only a short way of referring to the Crown acting through and on the advice of Her Ministers in Canada or in that other territory within the Commonwealth'.

[54] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152 (Knox CJ, Isaacs, Rich and Starke JJ). See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 638 (Dawson J) and *Svikart v Stewart* (1994) 181 CLR 548 at 560-561 (Mason CJ, Deane, Dawson and McHugh JJ), 565 (Brennan J), 579-581 (Gaudron J); *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 135 (Mason and Jacobs JJ); *Commonwealth v New South Wales* (1923) 32 CLR 200 at 204-205 (Knox CJ), 211 (Isaacs, Rich and Starke JJ), 217-218 (Higgins J); *Federated Municipal & Shire Council Employees' Union of Australia v Melbourne Corporation* (1919) 26 CLR 508 at 533 (Isaacs and Rich JJ).

[55] See, for example, *State Authorities Superannuation Board v Commissioner of State Taxation for the State of Western Australia* (1995) 189 CLR 253 (where the High Court accepted that the Crown in right of New South Wales could not benefit from a provision conferring a benefit specifically on the Crown in right of Western Australia).

[56] Greg Craven, 'The Constitutional Minefield of Australian Republicanism' (Spring 1992) 8(3) *Policy* 33 at 35.

[57] See *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 at 10 (Latham CJ), 26-27 (Dixon J), 29 (McTiernan J).

[58] See *Sue v Hill* (1999) 199 CLR 462 at 496 (Gleeson CJ, Gummow and Hayne JJ); *Commonwealth v Western Australia* (1999) 196 CLR 392 at 410-411 (Gleeson CJ and Gaudron J), 421 (McHugh J), 429-436 (Gummow J), 467-471 (Hayne J).

(b) references to localities jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth.

(2) In this section:
office includes a position occupied by an APS employee.
officer includes an APS employee.

As a general rule of statutory interpretation the 'Crown' is not bound by statute unless there are express words or a necessary intention that the Crown be bound.[59] This Crown immunity and privilege (the 'Shield of the Crown') may also extend to the servants and agents of the Crown,[60] but does not necessarily extend to more distant relationships with the Crown.[61] The particular problem arises where statute creates a separate legal entity from the 'Crown in right of the Commonwealth' as a body politic[62] or there is a dealing with a private entity (a natural person or a corporation), and each of those entities may, or may not, enjoy the Crown immunities and privileges.[63]

And in litigation, the *Judiciary Act 1903* (Cth) s 64 provides:

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

The consequence of this provision is to bind the Crown in right of the Commonwealth to statutes that bind the other parties (subjects) in the dispute.[64] Despite the statutory provision having an apparently broad operation,[65] it will only apply within the limits of federal judicial powers.[66] The effect of this provision on the Crown in right of the State is less certain, albeit the State *Crown Proceedings Acts* will apply.[67] In short, the entity of the 'Crown' is not a clear and certain concept and complex questions remain about the identity and the Crown immunity and privilege that might be attracted.[68]

4.3 The Governor-General

The Governor-General is appointed (and may be dismissed) by the Queen under a commission[69] that provides, in part:

> AND We authorise, empower and command you to exercise and perform all and singular the powers and directions contained in the Letters Patent dated 21 August 2008,[70] relating to the office of Governor-General or in future

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[59] See *Bropho v Western Australia* (1990) 171 CLR 1 at 14-15 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 116-122 (Gibbs ACJ), 127-129 (Stephen J), 134-138 (Mason and Jacobs JJ), 140 (Murphy J). Notably, however, *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* established that for a Commonwealth statute to bind the Crown in right of a State required express words or a necessary intention to bind the Crown in right of a State (at 122 (Gibbs ACJ), 129 (Stephen J), 138 (Mason and Jacobs JJ). See also Anthony Gray, 'Immunity of the Crown From Statute and Suit' (2010) 11 *Canberra Law Review* 1.

[60] See *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 123-124 (Gibbs ACJ), 129 (Stephen J), 137-138 (Mason and Jacobs JJ); *Registrar of Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 163-164 (Mason CJ, Deane, Toohey and Gaudron JJ).

[61] Such as holding property for the Crown: see *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282. See also *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330; *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219; *Commonwealth v Bogle* (1953) 89 CLR 229.

[62] See *Acts Interpretation Act 1901* (Cth) s 22(1)(a)

[63] See Nicholas Seddon, *Government Contracts: Federal, State and Local* (4th ed, 2008) pp 134-173.

[64] See *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263 (Gibbs CJ, Mason, Wilson, Deane, Dawson JJ); *Maguire v Simpson* (1977) 139 CLR 362 at 401-402 (Mason J), 404-406 (Jacobs J).

[65] See generally *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 203 (Gibbs J); *Maguire v Simpson* (1977) 139 CLR 362 at 401 (Mason J).

[66] See *Commonwealth v Mewett* (1997) 191 CLR 471 at 495-501 (Dawson J) and the references therein.

[67] See *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263 (Gibbs CJ, Mason, Wilson, Deane, Dawson JJ); *Maguire v Simpson* (1977) 139 CLR 362 at 401-402 (Mason J), 404-406 (Jacobs J).

[68] For an accessible analysis see Nicholas Seddon, *Government Contracts: Federal, State and Local* (4th ed, 2008) pp173-232.

[69] *Constitution* s 2.

> Letters Patent relating to that office, according to such instructions as Our Governor-General for the time being may receive or may in future receive from Us, and according to such laws as are from time to time in force.
>
> AND WE DO declare that the powers conferred by this Our Commission include any further powers that may in future be assigned to the Governor-General in accordance with section 2 of the *Constitution* of the Commonwealth of Australia.[71]

In modern times, the Governor-General is considered the autonomous representative of the Queen (a vice-regal position) and the government of the Commonwealth is the *only* source of advice.[72] Thus, the candidature for the position of Governor-General requires the advice of the Prime Minister.[73] Most importantly, though, at the time of Federation the Governor-General did not have a vice-regal position that could exercise all the powers (and immunities) of the Crown.[74] Instead the office of Governor-General only exercised the powers conferred by the *Constitution*[75] and the powers (and immunities) of the Crown that had been delegated,[76] giving effect to the phrase 'such powers and functions of the Queen as Her Majesty may be pleased to assign to him' in the *Constitution* s 2.[77] Since 1984, however, the *Letters Patent only* address the appointment of the Governor-General (and 'administrators' and 'deputies') with there being no explicit instructions.[78] This probably accepts that the Governor-General is a vice-regal position exercising all the Queen's powers detailed in the *Constitution*, and the prevailing view that *all* the necessary executive powers are conferred by the *Constitution*.[79]

4.3.1 Powers of the Governor-General

The specific powers of the Governor-General are confused by the authority of the *Constitution* for the Governor-General to exercise the executive power vested in the Queen,[80] as well as various other powers.[81] Importantly, the Governor-General is not exercising executive power when

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[70] See Commonwealth of Australia, *Gazette*, No S179, 9 September 2008. The terms and conditions of appointment are complemented by various entitlements set out in the *Governor General Act 1974* (Cth).

[71] See Commonwealth of Australia, *Gazette*, No S181, 10 September 2008.

[72] See *Attorney-General for the Commonwealth v T & G Mutual Life Society Ltd* (1978) 144 CLR 161 at 196-197 (Aickin J). See also Malcolm Hazell, 'The Role of the Governor-General' [2008] *Public Administration Today* 63.

[73] *Sue v Hill* (1999) 199 CLR 462 at 494 (Gleeson CJ, Gummow and Hayne JJ). Albeit, the Queen was given express power to appoint the first Governor-General: see *Commonwealth of Australia Constitution Act* (UK) s 3.

[74] See the previous *Letters Patent* and *Royal Instructions* as amended: *Letters Patent*, 29 October 1900 and amended in 1958; *Royal Instructions*, 29 October 1900 and amended in 1902, 1920 and 1958. See also W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) pp 669-694; John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 389-390.

[75] See *Constitution* ss 4 (dissolving the House of Representatives), 57 (dissolving the Senate and the House of Representatives simultaneously and convening joint sittings), 58 (assenting, withholding and reserving Bills), 61 (exercising the Executive power of the Commonwealth), 64 (appointing Ministers), 68 (commanding the naval and military forces of the Commonwealth), and so on.

[76] These were delegated according to the *Letters Patent*, the *Commission* and the *Instructions*: see W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) pp 670-681; John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 391-400.

[77] See, for example, *Commonwealth v Colonial Combing Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 453-454 (Higgins J). See also Harold Renfree, *The Executive Power of the Commonwealth of Australia* (1984) pp 24-30 (noting that this commentary pre-dated the *Australia Act 1986* (Cth)). Notably, some commentators at the time considered that the Letters Patent and Royal Instructions were of little consequence as the Governor-General's duties stemmed from the *Constitution* alone: see W Harrison Moore, *Constitution of the Commonwealth of Australia* (2nd ed, 1910) pp 161-162.

[78] See Commonwealth of Australia, *Gazette*, No S334, 24 August 1984 as amended; Commonwealth of Australia, *Gazette*, No S179, 9 September 2008.

[79] See Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) p 343. Commonwealth of Australia, *Gazette*, No S270, 9 September 1998. See also David Smith, 'The Role of the Governor-General' in Samuel Griffith Society, *Proceedings of the Eighth Conference of the Samuel Griffith Society*, Vol 8 (1997) pp 173-174 (detailing statements of the Governor-general about his actions in November 1975 and the Queen's correspondence with the Speaker of the House of Representatives).

[80] *Constitution* ss 2 and 61. Notably there is no such confusion for State Governors: see *Australia Act 1986* (Cth) s 7.

[81] See *Constitution* ss 67 (appoint public servants), 72 (appoint judges), 103 (appoint members of the Inter-state Commission), 128 (submit proposed laws to amend the *Constitution*), and so on.

assenting to proposed laws, withholding assent or reserving the proposed law for the Queen's assent.[82] As set out above, the Governor-General in contemporary times probably has expansive powers and is a vice-regal position exercising all the Queen's powers detailed in the *Constitution*.[83] In the context of executive powers the High Court appears to favour a wide view that the Governor-General has as much power as is necessary for the Executive government of the Commonwealth.[84] This is consistent with the *Constitution* s 61 and the broad powers conferred to execute and maintain the *Constitution*.[85] The content and scope of the prerogative powers of the Crown and the Governor-General and the executive power of the Commonwealth are considered further below (Chapter 5).

As a general principle, however, the Governor-General acts on the advice of the Ministers constitutionally assigned as members of the Federal Executive Council[86] – this proposition being central to the concept of 'responsible government',[87] and the convention that the Governor-General should act on advice in exercising the other constitutional powers.[88] This distinction becomes important where the *Constitution* provides for decisions by the 'Governor-General in Council' requiring the advice of the Federal Executive Council,[89] and decisions by the 'Governor-General' requiring *only* the advice of the Prime Minister or other Minister.[90] In this respect, the *Acts Interpretation Act 1901* (Cth) specifically provides:

> **16A References to the Governor-General**
> Where, in an Act, the Governor-General is referred to, the reference shall, unless the contrary intention appears, be deemed to include:
> (a) the person for the time being administering the Government of the Commonwealth; or
> (b) where the reference occurs in or in relation to a provision conferring on the Governor-General a power or function which the Governor-General or the person administering the Government of the Commonwealth has for the time being assigned to a person as his deputy, that last-mentioned person in his capacity as deputy;
> and shall, unless the contrary intention appears, be read as referring to the Governor-General, or a person so deemed to be included in the reference, acting with the advice of the Executive Council.

Perhaps the only exceptions to this convention are the 'reserve powers' that may be exercised *without* advice (see Chapter 5). Notably, however, the formal advice available to the Governor-General is only from the Ministers constitutionally assigned as members of the Federal Executive Council, and does not include advisory opinions from the High Court.[91] Perhaps an important distinction arises,

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[82] See *Constitution* s 58. See also John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 406.

[83] See Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) p 343. But see W Harrison Moore, 'The Commonwealth of Australia Bill' (1900) 16 *Law Quarterly Review* 35 at 36-38. See also G J McCarry, 'Reflections on Control of the Governor-General's Powers' (1978) 13 *West Australian Law Review* 324.

[84] See Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) p 342.

[85] Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) p 342. See also John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 390-391.

[86] This will at least include advice in respect of the *Constitution* ss 32 (elections of the House of Representatives), 33 (writs for vacancies), 64 (establishing departments), 67 (appointing civil servants), 72 (appointing judges) and 103 (appoint members of the Inter-State Commission).

[87] See John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 406. See also *New South Wales v Commonwealth* (1975) 135 CLR 337 at 364-365 (Barwick CJ); Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) pp 341-342.

[88] These include *Constitution* ss 5 (times for holding Parliament), 57 (convening joint sittings after a double dissolution), 58 (assenting to Bills), 64 (appointing department administering officers), and so on.

[89] See *Constitution* ss 32 (elections of the House of Representatives), 33 (writs for vacancies), 64 (establishing departments), 67 (appointing civil servants), 72 (appointing judges) and 103 (appoint members of the Inter-State Commission).

[90] See *Constitution* ss 5 (times for holding Parliament), 57 (convening joint sittings after a double dissolution), 58 (assenting to Bills), 64 (appointing department administering officers), and so on.

[91] See *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-267 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ). See also, for a recent example, *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 300, 303 and 305 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ), 314 and 316-319 (Brennan J), 320 (Toohey J); *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 580 (Gaudron, Gummow and Hayne JJ), 593-595 (Kirby J); *North Ganalanja Aboriginal*

as a matter of practice, that the Governor-General often delays the endorsement of documents presented while seeking further advice or information from the relevant Ministers. The extent of this practice is unclear as these delays and their causes remain confidential, albeit they demonstrate that the Governor-General has a role in addressing the content of what is presented rather than merely endorsement. Thus, apart from the formal powers, the other authority the Governor-General might exercise is the right to be consulted, the right to encourage and the right to warn constitutional advisers (Ministers).[92]

4.3.2 The roles of the Governor-General

The Governor-General's key roles under the *Constitution* are:

(a) *Legislative* – As part of the legislative power vested in the Queen (and the Governor-General as her representative),[93] the Senate and the House of Representatives,[94] and in assenting to Bills in the Queen's name.[95] The Governor-General also has broad powers to make delegated legislation.[96] Other powers include setting times for holding Parliament,[97] proroguing Parliament,[98] dissolving the House of Representatives,[99] issuing writs for the general election of the House of Representatives (the Senate being within the purview of State Governors),[100] issue writs for casual vacancies of the House of Representatives in the absence of a Speaker,[101] recommend appropriations to the House of Representatives,[102] and ordering a double dissolution of both the Senate and House of Representatives where there is disagreement between the chambers.[103]

(b) *Executive* – As part of the executive power vested in the Queen and exercisable by the Governor-General.[104] Other powers include choosing and summoning members of the Federal Executive Council,[105] appointing (and dismissing) Ministers,[106] and appointment (and dismissal) of the other officers of the executive government.[107]

(c) *Commander Naval and Military Forces* – As the Queen's representative exercising her powers in respect of the Commander Naval and Military Forces of the Commonwealth.[108]

Corporation v Queensland (1996) 185 CLR 595 at 612 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ), 642 (McHugh J); and so on. But see Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) p 414 (recommending the High Court be invested with an advisory jurisdiction).

92 See *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342 at 354-355 (Mason J), 401 (Wilson J).

93 *Constitution* s 2.

94 *Constitution* s 1.

95 *Constitution* s 58. See also Enid Campbell, 'Royal Assent of Bills – A Postscript' (2003) 14 *Public Law Review* 205.

96 This power is generally conferred on the Governor-General as part of an Act of Parliament, but it is a necessary element in formalising delegated legislation that has the approval of each part of the parliament: see also *Legislative Instruments Act 2003* (Cth) ss 38-41 (detailing the tabling requirements for most delegated legislation).

97 *Constitution* s 5.

98 *Constitution* s 5.

99 *Constitution* s 5.

100 *Constitution* s 32.

101 *Constitution* s 33.

102 *Constitution* s 56.

103 *Constitution* s 57. See also *Victoria v Commonwealth* (1975) 134 CLR 81 (Barwick CJ, McTiernan, Menzies, Gibbs, Stephen & Mason JJ); *Cormack v Cope* (1974) 131 CLR 432 (Barwick CJ, McTiernan, Menzies, Gibbs, Stephen & Mason JJ); and so on.

104 *Constitution* s 61.

105 *Constitution* s 62.

106 *Constitution* s 64.

107 *Constitution* s 67. Notably, this is subject to the Parliament providing otherwise, which it has done extensively by Acts of Parliament.

108 *Constitution* s 68. Notably, the Governor-General's powers are titular only: see Mitchell Jones, 'The Governor-General as Commander-in-Chief' (2009) 16 *Australian Journal of Administrative Law* 82; Ninian Stephens, 'The Governor-General as Commander-in-Chief' (1984) 14 *Melbourne University Law Review* 563.

The other significant roles of the Governor-General include appointing and removing judges to Federal courts,[109] appointing and removing members of the Inter-State Commission,[110] and submitting proposed constitutional amendments to referendum.[111] The various roles of the Governor-General are, however, evolving over time.[112]

4.3.3 The Crown prerogatives and the Governor-General

The Crown prerogatives are those powers belonging to the Crown and some of which are exercisable by the Governor-General.[113] The prerogatives are limited because no new prerogatives can be created[114] and where there is legislation in conflict with a prerogative then the legislation will prevail.[115] The content of the prerogatives, however, remains a vexed question in Australia: Whether the Governors and Governor-General exercise only part of the prerogatives conferred on them? How the prerogatives are divided between the Governors and Governor-General? Can the Crown be divided so that the Crown can act on the advice of different Ministers?

In the context of executive power the content of the Crown prerogatives, and those exercisable by the Governor-General, will in large part depend on the meaning of the *Constitution* s 61 'the executive power of the Commonwealth'. The various decisions of the High Court provide some insights, albeit there is no definitive answer to the exact boundaries of the prerogatives.[116] Perhaps significantly, courts have the jurisdiction to consider the existence and exercise of a prerogative, albeit the existence may be vague and only partly characterised.[117] These matters are considered in more detail below (Chapter 5).

4.4 Federal Executive Council

The *Constitution* s 62 establishes a 'Federal Executive Council' to 'advise the Governor-General in the government of the Commonwealth' and the *Constitution* s 63 provides that the functions or powers vested in the 'Governor-General in Council' by the *Constitution* must be exercised with the advice of the 'Federal Executive Council'. In effect the 'Federal Executive Council' is a committee chaired by the Governor-General and made up of Ministers (all of whom must be Members of Parliament,[118] and some of whom form the 'Cabinet'):[119]

> Whilst the *Constitution*, in s 61, recognises the ancient principle of the Government of England that the executive power is vested in the Crown, it adds as a graft to that principle the modern political institution, known as

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[109] *Constitution* s 72.
[110] *Constitution* s 103.
[111] *Constitution* s 128.
[112] See George Winterton, 'The Evolving Role of the Australian Governor-General' in Matthew Groves (ed), *Law and Government in Australia* (2005) pp 44-58 and the references therein.
[113] See *Constitution* ss 2 and 61.
[114] See *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* (1982) 152 CLR 25 at 69 (Stephen J), 139 (Wilson J), 155 (Brennan J); *Barton v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 143 (Knox CJ, Isaacs, Rich and Starke JJ).
[115] See, for examples, *Barton v Commonwealth* (1974) 131 CLR 477 at 484 (Barwick CJ), 501 (Mason J); *Johnson v Kent* (1975) 132 CLR 164 at 170 (Barwick CJ); *Brown v West* (1990) 169 CLR 195 at 202 and 204 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). Notably State legislation may not be able to limit Commonwealth prerogatives: see *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 377-379 (Dixon CJ), 381 (Kitto J), 389-390 (Menzies J), 390 (Windeyer J), 390 (Owen J).
[116] See, for examples, *Australian Communist Party v Commonwealth* (1950) 83 CLR 1; *Federal Commissioner Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278; *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Commonwealth v Colonial Combing Spinning and Weaving Co Ltd* (1922) 31 CLR 421; *Joseph v Colonial Treasurer of New South Wales* (1818) 25 CLR 32; *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644.
[117] See Chris Horan, 'Judicial Review of Non-Statutory Executive Powers' (2003) 31 *Federal Law Review* 551 and the citations therein.
[118] *Constitution* s 64.
[119] See *New South Wales v Commonwealth* (1975) 135 CLR 337 at 364-365 (Barwick CJ). See also *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342 at 382 (Aickin J).

> responsible government, which shortly expressed means that the discretionary powers of the Crown are exercised by the wearer of the Crown or by its Representative according to the advice of ministers, having the confidence of that branch of the legislature which immediately represents the people. The practical result is that the executive power is placed in the hands of a Parliamentary Committee, called the Cabinet, and the real head of the Executive is not the Queen but the Chairman of the Cabinet, or in other words the Prime Minister.[120]

The composition of the 'Federal Executive Council':

> Members of the Executive Council are chosen, summoned and sworn in by the Governor-General and hold office at the Governor-General's pleasure. As with most powers of the Governor-General under the Constitution, the power to appoint and dismiss executive councillors is exercised on ministerial advice, in this case the advice of the Prime Minister.
>
> In accordance with section 64 of the *Constitution*, all ministers of state (ministers and parliamentary secretaries) must be members of the Executive Council. The title 'The Honourable' may be used by all members for the duration of their appointment, ie usually for life. Only those executive councillors who are members of the current ministry are summoned to advise the Governor-General at meetings of the Council.
>
> While the Governor-General presides over meetings of the Executive Council, she is not a member of the Council. The powers exercised by the Governor-General on the advice of the Executive Council are referred to as those of the 'Governor-General in Council'.[121]

The work of the 'Federal Executive Council' is to 'advise the Governor-General in the government of the Commonwealth':[122]

> Powers exercisable by the Governor-General in Council under the *Constitution* or, more commonly under Acts of Parliament, include:
> (a) the making of proclamations (notices given under an Act by the Governor-General of a particular matter such as the commencement of the Act on a specified day);
> (b) the making of regulations and ordinances (under delegated authority under an Act);
> (c) the making and terminating of appointments to statutory offices, boards, commissions, courts and tribunals and diplomatic posts;
> (d) changes to the *Administrative Arrangements Order*, including the creation and abolition of government departments (*Constitution*, s 64);
> (e) the issuing of writs for the election of members of the House of Representatives (Constitution, ss 32 and 33), and senators for the Territories (*Commonwealth Electoral Act 1918*, s 151);
> (f) the approval of compulsory land acquisitions;
> (g) the authorisation of Australia's entry into international treaties;
> (h) the commissioning of officers in the Defence Force;
> (i) the authorisation of government borrowings overseas;
> (j) grants of land to Aboriginals; and
> (k) authorising the issue of Treasury Notes and Commonwealth Inscribed Stock.[123]

As a matter of practice, while the 'Federal Executive Council' is an informal consultative body meeting to agree on advice to be provided to the Queen,[124] it is actually giving effect to the formal decisions of the 'Cabinet' or Minister – 'the formal legal act which gives effect to the advice tendered to the Crown by the Ministers of the Crown'.[125] There are, however, two important limitations on the work of the Federal Executive Council:

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[120] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 703.
[121] Federal Executive Council Secretariat, *Federal Executive Council Handbook* (2009) p 3.
[122] *Constitution* s 62. Notably, Acts of Parliament referring to the 'Governor-General' are prescribed by the *Acts Interpretation Act 1901* (Cth) as 'shall, unless the contrary intention appears, be read as referring to the Governor-General, or a person so deemed to be included in the reference, acting with the advice of the Executive Council': *Acts Interpretation Act 1901* (Cth) s 16A.
[123] Federal Executive Council Secretariat, *Federal Executive Council Handbook* (2009) p 4. See also *Sankey v Whitlam* (1978) 142 CLR 1 at 52-53 (Stephen J) setting out the form and content of some Executive Council documents.
[124] See Geoffrey Sawer, 'Council, Ministers and Cabinets in Australia' [1956] *Public Law* 110.
[125] See *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342 at 352 (Stephen J citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 179 (Dixon J)), 373-375 (Murphy J), 382 (Aickin J), 415 (Brennan J).

(a) *Conventions* – The Governor-General is accorded a number of courtesies in respecting her position, including the 'requirement that there be no prior announcement of decisions requiring consideration by the [Federal] Executive Council', with the exception being, 'in exceptional circumstances, such an announcement has been agreed in advance by the Governor-General'.[126]

(b) *Decision not requiring the advice of the 'Federal Executive Council'* – As a *Constitution* distinguishes between decision of the 'Governor-General in Council'[127] and the 'Governor-General',[128] the former requires the advice of the 'Federal Executive Council', while the latter only requires the advice of the prime Minister or other Minister.[129]

The Secretariat for the 'Federal Executive Council' is a part of the Department of the Prime Minister and Cabinet.[130]

4.5 Intra-executive entities

The *Constitution* is essentially silent on the form and structure of the Executive providing only for 'Ministers' to administer Departments of State established by the Governor-General[131] the appointment and removal of public servants ('civil servants').[132] In short, the *Constitution* anticipates that the Parliament and the Executive will settle the structures and governance arrangements for the exercise of executive power, and over the decades this has been an ongoing evolutionary task. The following details the key structures and governance arrangements.

4.5.1 'Cabinet'

The 'Cabinet' is a collection of Ministers that together form a committee that heads the Executive and is the paramount authority in government[133] – 'a body which is "the connecting link, the hyphen, the buckle" fastening the legislative to the executive part of Federal Government'.[134] As the High Court has noted: '[t]he Cabinet, which has no place in the formal *Constitution*, is a committee of Ministers of the ruling parliamentary party or parties',[135] albeit a committee possibly attracting special consideration for its deliberations.[136] As a committee the Cabinet arrangements are determined by the Australian Government of the day, addressing the form, content and requirements for its functioning. Thus:

> The Cabinet is a product of convention and practice. It is not mentioned in the Australian Constitution, and its establishment and procedures are not the subject of any legislation. It is for the government of the day, and in particular the Prime Minister, to determine the shape and structure of the Cabinet system and how it is to operate.

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126 Federal Executive Council Secretariat, *Federal Executive Council Handbook* (2009) p 1.

127 See *Constitution* ss 32 (elections of the House of Representatives), 33 (writs for vacancies), 64 (establishing departments), 67 (appointing civil servants), 72 (appointing judges) and 103 (appoint members of the Inter-State Commission).

128 See *Constitution* ss 5 (times for holding Parliament), 57 (convening joint sittings after a double dissolution), 58 (assenting to Bills), 64 (appointing department administering officers), and so on.

129 See Federal Executive Council Secretariat, *Federal Executive Council Handbook* (2009) p 3.

130 See Federal Executive Council Secretariat, *Federal Executive Council Handbook* (2009) pp 1-2. See also Department of the Prime Minister and Cabinet, *Annual Report 2008-09* (2009) p 80.

131 *Constitution* s 64.

132 *Constitution* s 67.

133 See *Minister for Arts, Heritage and Environment v Peko-Wallsend* (1987) (1987) 75 ALR 218 at 225 (Bowen CJ). See also John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 703-707.

134 John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 383.

135 *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342 at 373 (Murphy J).

136 See, for examples, *Commonwealth v Northern Lands Council* (1993) 176 CLR 604 at 615 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ); *South Australia v O'Shea* (1987) 163 CLR 378 at 387-388 (Mason CJ), 402-403 (Wilson and Toohey JJ), 419-420 (Deane J). See also PW Hogg, 'Judicial Review of Action by the Crown Representative' (1969) 43 *Australian Law Journal* 215 at 219-20.

> The Ministry, the Cabinet and Cabinet committees are all elements of the Cabinet system. In settling its Cabinet arrangements, it is open to a government to adopt the organisation and system it wants subject only to the provisions of the Ministers of State Act 1952 which place an upper limit (currently 30) on the number of ministers. Ministers may be assisted by parliamentary secretaries.
>
> …
>
> The Cabinet itself is the apex of executive government. Meeting regularly, it sets the broad directions of government, takes the most important decisions facing a government and resolves potential conflicts within government. The outcome of some of the Cabinet's deliberations require action by the Governor-General, ministers or holders of statutory office to be put into effect.
>
> Some work of the Cabinet sensibly falls to be dealt with by its committees. Committees serve a useful purpose in dealing with the highly sensitive, for example revenue or security matters; the relatively routine, for example a government's weekly parliamentary programme; and business that is labour intensive or requiring detailed consideration by a smaller group of ministers, for example the expenditure review that takes place before the annual budget or oversight of the Government's initiatives in relation to a sustainable environment.[137]

As a general proposition Cabinet deliberations are confidential and are not amenable to review by the courts[138] or the Parliament (or the public).[139] The main arguments justifying Cabinet confidentiality are that the practice promotes Cabinet solidarity and candour,[140] albeit the confidentiality is a public interest immunity determined by a court.[141] Thus:

> In the case of documents recording the actual deliberations of Cabinet, only considerations which are indeed exceptional would be sufficient to overcome the public interest in their immunity from disclosure, they being documents with a pre-eminent claim to confidentiality ... Indeed, for our part we doubt whether the disclosure of the records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings.[142]

4.5.2 Ministers (and Parliamentary Secretaries)

The *Constitution* provides for the appointment of Ministers by the Governor-General on the advice of the Prime Minister,[143] that Ministers must sit in Parliament (either the Senate or the House of Representatives),[144] that their number is prescribed by the *Ministers of State Act 1952* (Cth),[145] and that their salaries are appropriated out of the Consolidated Revenue Fund (CRF).[146] The *Ministers of State Act 1952* (Cth) provides:

> The number of the Ministers of State must not exceed:
> (a) in the case of those designated, when appointed by the Governor-General, as Parliamentary Secretary – 12; and
> (b) in the case of those not so designated – 30.[147]

By convention the Prime Minister, being the person commanding a majority in the House of Representatives, is appointed by the Governor-General according to a 'reserve power'.[148] Ministers

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[137] Department of the Prime Minister and Cabinet, *Cabinet Handbook* (5th ed, 2004) p 1.
[138] See *Commonwealth v Northern Lands Council* (1993) 176 CLR 604 at 615 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ); *South Australia v O'Shea* (1987) 163 CLR 378 at 387 (Mason CJ); and so on.
[139] See *Archives Act 1983* (Cth) s 22A ('Cabinet notebooks'); *Freedom of Information Act 1982* (Cth) ss 34 (Cabinet documents) and 35 (Executive Council documents).
[140] See *Commonwealth v Northern Lands Council* (1993) 176 CLR 604 at 614-615 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).
[141] See *Commonwealth v Northern Lands Council* (1993) 176 CLR 604 at 619 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).
[142] *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 617-618 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).
[143] *Constitution* s 64.
[144] *Constitution* s 64.
[145] *Constitution* s 65.
[146] *Constitution* s 66.
[147] *Ministers of State Act 1952* (Cth) s 4.

also hold their public office under the Crown, and as a consequence, they are probably responsible to the Crown as delegates or agents, but not as employees.[149] Of particular note is the office of Attorney-General that carries with it various common law functions,[150] and a responsibility to provide legal advice to the Crown.[151] Further, a Minister must be appointed to administer a particular department and cannot be a Minister of State without portfolio.[152] There may, however, be more than one Minister for each department.[153]

The appointment of Ministers (and parliamentary Secretaries) by the Governor-General also includes a direction. Thus, for example, the contested and valid instrument of appointment in *Re Patterson; Ex parte Taylor* provided:

> I, WILLIAM PATRICK DEANE, Governor-General of the Commonwealth of Australia, pursuant to sections 64 and 65 of the *Constitution*, hereby appoint SENATOR THE HONOURABLE KAY CHRISTINE LESLEY PATTERSON, a member of the Federal Executive Council, to administer THE DEPARTMENT OF FOREIGN AFFAIRS AND TRADE AND THE DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS.
>
> Further, pursuant to section 4 of the *Ministers of State Act 1952*, I designate SENATOR THE HONOURABLE KAY CHRISTINE LESLEY PATTERSON as PARLIAMENTARY SECRETARY.
>
> I direct SENATOR THE HONOURABLE KAY CHRISTINE LESLEY PATTERSON to hold the office of PARLIAMENTARY SECRETARY TO THE MINISTER FOR FOREIGN AFFAIRS and the office of PARLIAMENTARY SECRETARY TO THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS.[154]

The content of a Minister's (and Parliamentary Secretary's) responsibilities are provided for in the *Administrative Arrangement Order* according to the form set out below and the schedule setting out 'Matters dealt with by the Department' and 'Legislation administered by the Minister':

1. The matters dealt with by a Department of State include:
   (a) the matters referred to in the Part of the Schedule relating to that Department; and
   (b) matters arising under the legislation administered by a Minister of State administering the Department.
2. The legislation administered by a Minister of State administering a Department is:
   (a) the legislation referred to in the Part of the Schedule relating to that Department; and
   (b) legislation passed before or after the date of this Order, that relates to a matter dealt with by the Department, not being legislation referred to in another Part of the Schedule.

To avoid any confusion about references to 'Minister' in legislation, the *Acts Interpretation Act 1901* (Cth) makes various provisions to identify the relevant Minister.[155]

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[148] See Susan Downing, *The Reserve Powers of the Governor-General*, Parliamentary Library Research Paper Research Note 25 (1997).

[149] See *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 351-353 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), 369 (Deane J).

[150] See, for example, *Queensland v Commonwealth* (1977) 139 CLR 585 at 615 (Aickin J).

[151] See John Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (1964) pp 15-20. See also Alana McCarthy, 'The Evolution of the Role of the Attorney-General' [2004] *Murdoch University Electronic Journal of Law* 30.

[152] *Constitution* ss 44 and 64. See also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 457-458 (Gummow and Hayne JJ).

[153] See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 403 (Gleeson CJ), 415-416 (Gaudron J), 464-465 (Gummow and Hayne JJ), 499-500 (Kirby J), 519 (Callinan J). See also Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament* (1981) pp 68-69; Geoffrey Lindell, 'Responsible Government' in Paul Finn (ed), *Essays on Law and Government, Volume 1 Principles and Values* (1995) pp 91-92.

[154] *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 452 (Gummow and Hayne JJ).

[155] See *Acts Interpretation Act 1901* (Cth) ss 19, 19A, 19B and 19BA.

4.5.3 Ministerial advisers

Members of Parliament are provided with an allocation of staff according to the *Members of Parliament (Staff) Act 1984* (Cth) that is specifically intended to deal with those employed outside the 'public service' (and the *Public Service Act 1999* (Cth)) and within the political arena of Parliament:

> Members of Parliament need staff. They need staff to assist them in dealing with their constituencies; to help them deal with policy issues and to liaise with their parties; and to help manage their parliamentary responsibilities. These are not roles to be undertaken by public servants, who serve the government of the day. Having political staff is intended to ensure these roles are adequately and professionally performed, and to help ensure that the public service does not become politicised.[156]

Those engaged under the *Members of Parliament (Staff) Act 1984* (Cth) include staff (and consultants) to assist Senators, Members, Ministers and other Parliamentary office-holders, such as the leaders of the non-government parties. There has in recent times been a proliferation of Ministerial advisers engaged under the *Members of Parliament (Staff) Act 1984* (Cth) and they have 'become pivotal to the interaction between government and bureaucracy',[157] often exercising considerable executive power (presumably on behalf of their Minister).[158] The actual roles, responsibilities and levels of accountability remain unclear and contentious.[159]

The interaction between the *Public Service Act 1999* (Cth) public servants and those engaged under the *Members of Parliament (Staff) Act 1984* (Cth) by Ministers in the Parliament (or Ministerial advisers) is generally regulated by practices and protocols.[160] Despite these practices and protocols a tension remains between these elements that reflect concerns about accountability, responsibility and transparency of Ministerial advisers.[161]

4.5.4 The 'Public Service'

The *Constitution* s 67 provides:

> Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.

The major source of authority to employ public servants is now the *Public Service Act 1999* (Cth) (see ¶8.2). The Governor-General in Council issues 'administrative arrangements' that detail the functions to be performed by each department and the legislation administered by each Minister.[162] In addition to the *Public Service Act 1999* (Cth) there are a number of others engaged by the Executive (either under the *Constitution* s 67 or other legislation) and paid out of the CRF (some with further allowances determined according to the *Remuneration Tribunals Act 1973* (Cth)). These include: the Governor-General,[163] the Senators and Members of the House of Representatives,[164] the

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156 Finance and Public Administration References Committee, Senate, *Staff employed under the Members of Parliament (Staff) Act 1984 (Cth)* (2003) p xi.

157 Finance and Public Administration References Committee, Senate, *Staff employed under the Members of Parliament (Staff) Act 1984 (Cth)* (2003) p xi.

158 See, for example, Norman Abjorensen, *Delegatus Non Potest Delegare: Defining the Role of Ministerial Advisors*, Discussion Paper 12/07 (2007); Ian Holland, *Accountability of Ministerial Staff?*, Parliamentary Library Research Paper No 19 (2002).

159 See Senate Finance and Public Administration References Committee, *Staff Employed Under the Members of Parliament (Staff) Act 1984* (2003). See also Anne Tiernan, 'Overblown or Overload? Ministerial Staff and Dilemmas of Executive Advice' (2006) 25 *Social Alternative* 7.

160 See Australian Public Service Commission, *State of the Service Series 2007-08* (2008) pp 187-198. See also Australian National Audit Office, *Agency Management of Parliamentary Workflow*, Better Practice Guide (2008); Australian Public Service Commission, *Supporting Ministers, Upholding the Values* (2006).

161 For a recent example see Michael Keating, 'In the Wake of 'Certain Maritime Incident'; Ministerial Advisers, Departments and Accountability' (2003) 62 *Australian Journal of Public Administration* 92. See also Anne Tiernan, *Power without Responsibility: Ministerial Staffers in Australian Governments From Whitlam to Howard* (2007).

162 These are the *Administrative Arrangements Order*. See also *Acts Interpretation Act 1901* (Cth) s 19BA.

163 *Constitution* s 3.

Ministers of State (including Parliamentary Secretaries),[165] judges appointed under the *Constitution* s 72,[166] members of the Inter-State Commission,[167] and staff (and consultants) to assist Senators, Members, Ministers and other Parliamentary office-holders.[168] There are a number of bodies that can employ under their enabling legislation *and* the *Public Service Act 1999* (Cth).[169] There are also other anomalous employment-like provisions throughout the Commonwealth's statute book. So, for example, employees of the Royal Mint may be employed as Commonwealth public servants.[170] Of particular interest, however, are those engaged in the Australian naval and military forces of Australia. According to the *Constitution*, the command of the naval and military forces is 'vested in the Governor-General as the Queen's representative'.[171] Meanwhile, the Commonwealth Parliament's legislative powers 'for the peace, order, and good government of the Commonwealth' extend to making laws for: 'the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth',[172] and 'the control of railways with respect to transport for the naval and military purposes of the Commonwealth'.[173] At Federation the public service departments in the States 'transferred to the Commonwealth' included 'naval and military defence',[174] and the States gave away the powers to 'raise or maintain any naval or military force' unless they had 'the consent of the Parliament of the Commonwealth'.[175] The effect of these provisions has been to confer command of the naval and military forces on the Governor-General and various controls on the defence forces within the legislative powers of the Commonwealth Parliament. However, there seems little doubt that the Governor-General's 'command' is merely 'one of the oldest and most honoured prerogatives of the Crown, but it is now exercised in a constitutional manner' so that it is 'command' with 'the advice of his Ministry having the confidence of Parliament'.[176]

This constitutional arrangement has been resolved through legislation, the *Defence Act 1903* (Cth), with the Minister having 'the general control and administration of the Defence Force',[177] with the Governor-General having a discretionary power to appoint a Chief of the Defence Force, a Chief of Navy, a Chief of Army and a Chief of Air Force,[178] each with powers to 'be exercised subject to and in accordance with any directions of the Minister'.[179] Significantly, the appointed Chief of the Defence Force, Chief of Navy, Chief of Army and Chief of Air Force exercise the powers vested in

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[164] *Constitution* s 48.
[165] *Constitution* s 66. See also *Ministers of State Act 1952* (Cth) ss 5 and 6.
[166] *Constitution* s 72.
[167] *Constitution* s 103.
[168] *Members of Parliament (Staff) Act 1984* (Cth) ss 4, 13 and 20.
[169] See, for examples, Australian Bureau of Statistics (*Australian Bureau of Statistics Act 1975* (Cth)), Australian Electoral Commission (*Commonwealth Electoral Act 1918* (Cth)), Australian Institute of Family Studies (*Family Law Act 1975* (Cth)), Australian Securities and Investments Commission (*Australian Securities and Investments Commission Act 2001* (Cth)), Corporations and Markets Advisory Committee (*Australian Securities and Investments Commission Act 2001* (Cth)), Department of Defence (*Defence Act 1903* (Cth), *Naval Defence Act 1910* (Cth) and the *Air Force Act 1923* (Cth)), Office of Audit and Assurance Standards Board (*Australian Securities and Investments Commission Act 2001* (Cth)), Office of the Australian Accounting Standards Board (*Australian Securities and Investments Commission Act 2001* (Cth)), Office of the Director of Public Prosecutions (*Director of Public Prosecutions Act 1983* (Cth)), Office of National Assessments (*Office of National Assessments Act 1977* (Cth)).
[170] See *Mint Employees Act 1964* (Cth).
[171] *Constitution* s 68.
[172] *Constitution* s 51(vi).
[173] *Constitution* s 51(xxxii).
[174] *Constitution* s 69.
[175] *Constitution* s 114. See also *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 464 (Gummow J): 'Section 114 supplements, in the federal system, the authority of the Legislature established by the English constitutional settlement whereby the Executive cannot raise or maintain a standing army in time of peace without consent of the Legislature' (footnote omitted).
[176] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) 713.
[177] *Defence Act 1903* (Cth) s 8.
[178] *Defence Act 1903* (Cth) s 9.
[179] *Defence Act 1903* (Cth) s 8.

them by the Governor-General within the bounds of the *Constitution* s 68 that itself is confined to acting with ministerial advice (but not the 'Federal Executive Council').[180] The administration of the Defence Force is then jointly exercised by the Secretary to the Department of Defence *and* the Chief of the Defence Force ('the Diarchy'), except 'matters falling within the command of the Defence Force by the Chief of the Defence Force or the command of an arm of the Defence Force by the service chief of that arm of the Defence Force'.[181] Unfortunately, this leaves a number of constitutional and direction and control issues between the Governor-General and the Executive unresolved.[182]

4.5.5 Statutory office holders and entities

The Commonwealth's statute book maintains a plethora of statutory office holders and entities each exercising some degree of power authorised by Parliament through a statute.[183] The constitutional authority for such entities is derived from the *Constitution* s 64 that provides for the establishment of 'such department of State of the Commonwealth' that has been interpreted so that 'it has always been accepted that the government can engage in conduct through statutory offices and authorities'.[184] As a generalisation:

> The existence of statutory authorities reflects decisions by government over time, and legislated for by Parliament, where it has been deemed desirable for particular activities to operate outside a traditional departmental structure. Statutory authorities generally have a single or primary role (albeit comprising many parts) that they are established to carry out, subject to varying degrees of ministerial control specified in legislation. The boundaries of a statutory authority's separation from direct ministerial control are drawn by the legislative framework. This framework includes the authority's enabling legislation, financial management legislation and, with some exceptions, the full range of administrative law provisions (for example, freedom of information and processes for appeal or review of decisions). In pursuing their legislated functions, statutory authorities (like departments) are subject to scrutiny by Ministers, the Parliament and the Auditor-General.[185]

The boundaries of executive power for some of these entities far removed from central government remain unclear. Of particular concern, however, are statutory corporations established to conduct commercial enterprises on behalf of the Executive, or that operate independently of Executive control (and in particular regulatory agencies).[186] Recent attempts have been made to identify and improve the governance of these entities within the rubric that better governance enhances accountability, responsibility and transparency.[187]

4.5.6 Other decision-makers – delegations and authorisations

A central tenet of 'responsible government' in Australia is that Ministers act both as rule-makers exercising legislative power and administrators exercising executive power, subject to overall

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[180] See generally Defence Review Committee, *Report on the Higher Defence Organisation in Australia*, Final Report (1982) p 329.

[181] *Defence Act 1903* (Cth) s 9A. Essentially the split in responsibility for the Diarchy is that the Chief of the Defence Force commands the Australian Defence Force and matters relating to military operations according to the *Defence Act 1903* (Cth) and the Secretary to the Department of Defence addresses policy, departmental and resources according to the *Public Service Act 1999* (Cth).

[182] See, for example, Michael Head, *Calling Out the Troops: The Australian Military and Civil Unrest: The Legal and Constitutional Issues* (2009).

[183] See generally Department of Finance and Deregulation, *List of Australian Government Bodies and Governance Relationships*, Financial Management Reference Materials No 1 (3rd ed, 2009).

[184] See Guy Aitken and Robert Orr, *Sawer's The Australian Constitution* (3rd ed, 2002) pp 109-111. See also John Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) pp 17 and 32.

[185] John Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) pp 16-17.

[186] See, for example, Cosmo Howard and Robyn Seth-Purdie, 'Governance Issues for Public Sector Boards' (2005) 64 *Australian Journal of Public Administration* 56.

[187] See John Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, Report to the Prime Minister and Minister for Finance and Administration (2003). See also Australian Public Service Commission, *Building Better Governance* (2008); Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No 2 (2005).

Parliamentary scrutiny and control.[188] Within the context of exercising these powers, Minister's and others may be given powers by Parliament that they then delegate to others, or authorise others to exercise, with the effect that others are exercising powers traceable as an exercise of executive power.[189] In short, executive power may be delegated (delegation), or another authorised to exercise the power (authorisation), so that the functioning of government is workable. As a generalisation, when Parliament vests power in a person that person is required to exercise the power personally ('*delegatus non potest delegare*'). Delegations and authorisations are, however, contours to this general principle:

(a) An express delegation – The *Acts Interpretation Act 1901* (Cth) provides some guidance:

> **34AA Delegations**
> Where an Act confers power to delegate a function or power, then, unless the contrary intention appears, the power of delegation shall not be construed as being limited to delegating the function or power to a specified person but shall be construed as including a power to delegate the function or power to any person from time to time holding, occupying, or performing the duties of, a specified office or position, even if the office or position does not come into existence until after the delegation is given.
>
> **34AB Effect of delegation**
> Where an Act confers power on a person or body (in this section called the authority) to delegate a function or power:
> (a) the delegation may be made either generally or as otherwise provided by the instrument of delegation;
> (b) the powers that may be delegated do not include that power to delegate;
> (c) a function or power so delegated, when performed or exercised by the delegate, shall, for the purposes of the Act, be deemed to have been performed or exercised by the authority;
> (d) a delegation by the authority does not prevent the performance or exercise of a function or power by the authority; and
> (e) if the authority is not a person, section 34A applies as if it were.
>
> **34A Exercise of certain powers and functions by a delegate**
> Where, under any Act, the exercise of a power or function by a person is dependent upon the opinion, belief or state of mind of that person in relation to a matter and that power or function has been delegated in pursuance of that or any other Act, that power or function may be exercised by the delegate upon the opinion, belief or state of mind of the delegate in relation to that matter.

The effect of an express delegation is that the power that is transferred is transferred in entirety. A similar principle applies to delegated functions.

In some circumstances an Act or other law will expressly 'authorise' a person to exercise some power or function. The same principles apply as those that apply to a delegation of a power or function. As an example, the *Census and Statistics Act 1905* (Cth) provides:

> The Statistician may, by instrument in writing, appoint a specified officer, or officers included in a specified class of officers, to be an authorized officer or authorized officers, as the case may be, for the purposes of this Act.[190]

(b) *An implied authorisation (the Carltona principle)* – In some circumstances a person with a power can authorise another person to exercise that power for and on their behalf. The English decision in *Carltona Ltd v Commissioners of Works*[191] is authority for this proposition and has

[188] See, for example, *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 84-85 (Gavan Duffy CJ and Starke J), 87 (Rich J), 100-104 (Dixon J), 119-123 (Evatt J).
[189] See Management Advisory Board and Management Improvement Advisory Committee, *Delegated Authority Handbook* (1994).
[190] *Census and Statistics Act 1905* (Cth) s 16(1).
[191] [1943] 2 All ER 560.

been adopted in Australia.[192] Essentially, this enables administrative functions to be carried out by those authorised to act on behalf of (like an 'agent') the power holder. Thus in *O'Reilly v State Bank of Victoria Commissioners* power vested in the Commissioner of Taxation to issue notices requiring them to provide information, documents, and so on, could be exercised through an authorised officer, albeit the Commissioner of Taxation was accountable for exercising the power. Thus:

> … I should mention the line of authorities which commenced with *Carltona Ltd v Commissioners of Works* … Those authorities established that when a Minister is entrusted with administrative functions he may, in general, act through a duly authorized officer of his department. This result depended in part on the special position of constitutional responsibility which Ministers occupy, and in that respect these authorities are distinguishable from cases such as the present. However, they also rest on the recognition that the functions of a Minister are so multifarious that the business of government could not be carried on if he were required to exercise all his powers personally. Ministers are not alone in that position. This has been judicially recognized. *In Commissioners of Customs and Excise v Cure & Deeley Ltd*, it was said that the Commissioners in that case were in a position parallel to that of Ministers, and in *Ex parte Forster; Re University of Sydney*, the Senate of a University was regarded as being in a similar situation. I can see no reason why, in construing sections of the Act which confer powers on the Commissioner, it should not be proper to consider the undoubted fact that the Commissioner could not possibly exercise all those powers personally (footnotes omitted).[193]

These distinctions are also recognised under the *Financial Management and Accountability Act 1997* (Cth) for the Finance Minister and Chief Executives in delegating their powers.[194] Thus, for example, the *Financial Management and Accountability Regulations 1997* (Cth) r 26 provides:

> (1) The Chief Executive of an Agency may delegate to an official, by written instrument:
> (a) any of the Chief Executive's powers or functions under these Regulations (including this power of delegation) …
> (3) This regulation does not, by implication, limit:
> (a) any other power of a Chief Executive to authorise a person to act on behalf of the Chief Executive; or
> (b) any other power of an official to authorise a person to act on behalf of the official.

4.5.7 General governance arrangements

Various governance arrangements have been adopted from the time of Federation, with an evolution to the present arrangements centred on the legal status of the entity and its proximity to ministerial direction and control. While there have been a multitude of possible structures,[195] recent trends have been towards the following divisions:[196]

(a) *Financial Management and Accountability Act 1997* (Cth) Agencies (and prescribed Agencies) – These entities have the legal status of the Commonwealth, are financially part of the Commonwealth, generally have their money appropriated by Parliament and generally employ their staff under the *Public Service Act 1999* (Cth).[197] This includes Departments of

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[192] *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41 at [68] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 449-453 (Gummow and Hayne JJ); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 37-38 (Mason J); *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 at 11-12 (Gibbs CJ), 30-32 (Wilson J), 19-20 (Mason J dissenting). See also *Bounty Oil and Gas NL v Attorney-General* [2006] NZHC 727 at [27]-[28] (MacKenzie J); Mark Campbell, 'The Carltona Doctrine' (2007) 18 *Public Law Review* 251.

[193] *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 at 11-12 (Gibbs CJ).

[194] *Financial Management and Accountability Regulations 1997* (Cth) rr 24 (Finance Minister) and 26 (Chief Executives).

[195] And a multitude of possibilities remain: see Department of Finance and Deregulation, *List of Australian Government Bodies and Governance Relationships*, Financial Management Reference Materials No 1 (3rd ed, 2009).

[196] The 'policy' being that '[f]orming a new body outside either the *Financial Management and Accountability Act 1997* (Cth) or *Commonwealth Authorities and Companies Act 1997* (Cth) framework should not occur unless there are exceptional circumstances': Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No 2 (2005) p 2.

[197] See Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No 2 (2005) pp x and 2.

State, most primarily Budget-funded entities, entities holding public money raised under a Commonwealth law and regulation.

(b) *Commonwealth Authorities and Companies Act 1997* (Cth) bodies – These entities have a separate legal status from the Commonwealth, and hold their money and property separate from the Commonwealth.[198] The degree of Commonwealth control depends on the bodies' establishing legislation, albeit the portfolio Minister remain responsible for legislation in Parliament and providing relevant information about the bodies to Parliament (assisted by the Department).[199]

Despite these general structures there remain a plethora of variations that have evolved over time and in response to particular requirements. These variations are slowly being reformed to clearer structures through the updating of the Commonwealth's financial framework, the introduction of accrual budgeting and Agency banking, the introduction of broad principles for employment, and reforms to the obligations of directors' duties under the *Commonwealth Authorities and Companies Act 1997* (Cth).[200] There remain, however, some intractable governance problems that defy a generalised framework. Perhaps the best example is the High Court under the *High Court of Australia Act 1979* (Cth) that expressly provides that the 'Chief Justice and six other Justices [are] appointed by the Governor-General by commission',[201] that the 'High Court shall administer its own affairs subject to, and in accordance with' the *High Court of Australia Act 1979* (Cth) including dealings with its own money,[202] that the 'Chief Executive' is 'appointed by the Governor-General upon the nomination of the Court',[203] that employees are engaged outside the *Public Service Act 1999* (Cth),[204] and most importantly, is outside the ambit of the *Financial Management and Accountability Act 1997* (Cth) except where it is expending appropriated amounts.[205] The inherent management and decision-making tension, and the accountability to Parliament for decisions about spending appropriated amounts of money, between the Chief Justice and the Chief Executive essentially creates an unresolvable difficulty in imposing governance.

4.6 Super- and supra-national institutions

In the course of conducting the affairs of the nation, the Australian Government deals with the States and Territories (supra-national institutions) and with other nations (super-national institutions). In dealing with these super- and supra-national institutions the Australian Government can enter into arrangements that bind the Australian Government and dissipate the authority of Parliament to control the Executive. The following provide an illustration of the effects of these super- and supra-national institutions:

(a) *Super-national institutions* – The Australian Government signed and ratified the agreements establishing the World Trade Organisation (WTO) as part of the broader agreements about world trade. The effect of some of these agreements has been to require Australia to adopt certain minimum standards in laws applying to residents and non-residents. For example the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) requires minimum

198 See Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No 2 (2005) pp x and 2.
199 See Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No 2 (2005) pp x and 7.
200 Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No 2 (2005) p 8.
201 *High Court of Australia Act 1979* (Cth) s 5.
202 *High Court of Australia Act 1979* (Cth) s 17(1).
203 *High Court of Australia Act 1979* (Cth) s 18.
204 See *High Court of Australia Act 1979* (Cth) s 26.
205 See *High Court of Australia Act 1979* (Cth) s 35. Notably the High Court is audited (s 43) against the standards set by the Finance Minister: see amended *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2009* (Cth).

standards for intellectual property subject to trade sanctions for failure to comply. The arguable effect of joining the WTO and entering into agreements such as TRIPS is that the Parliament has been bound by the actions of the Executive. The Parliament has, however, sought to include itself into the treaty making process.[206] A comprehensive database of agreements, arrangements and understandings between the Commonwealth of Australia and other Nation States is maintained at the Australian Treaties Library available at www.austlii.edu.au/au/other/dfat and the Australian Treaties Database available at http://www.dfat.gov.au/treaties/index.html.

(b) *Supra-national institutions* – The Australian Government established with the States and Territories the COAG in 1992.[207] COAG (and now with the oversight of the COAG Reform Council) addresses a range of nationally significance policy reforms that require cooperative action of the Australian Government and State and Territory governments.[208] The arguable effect of some COAG arrangements has been to commit the Executive to certain policies and practices (particularly funding commitments)[209] without the authority of Parliament ('executive federalism').[210] Unfortunately there are a plethora of other agreements, arrangements and understandings between the Commonwealth of Australia and the various States and Territories, and there is no formal or comprehensive database or record available.

Recent amendment to the *Financial Management and Accountability Act 1997* (Cth)[211] and the *Commonwealth Authorities and Companies Act 1997* (Cth)[212] allow for regulations to establish better governance arrangements for 'interjurisdictional authorities'. This recognises the role and place of 'interjurisdictional authorities' and essentially allows the setting up of 'interjurisdictional authorities' to conduct interjurisdictional business, and provides a means for State and Territory involvement in their governance arrangements. For example, the *Commonwealth Authorities and Companies Act 1997* (Cth) provides:

> **33A Interjurisdictional authorities**
> (1) The regulations may prescribe:
> (a) a Commonwealth authority to be an interjurisdictional authority for the purposes of this section; and
> (b) persons who comprise an interjurisdictional authority (including directors and employees, for example); and
> (c) a Minister of a State, the Australian Capital Territory, or the Northern Territory to be a State/Territory Minister for an interjurisdictional authority.
> (2) The regulations may provide for the following:
> (a) the directors of an interjurisdictional authority to give an interim report, for a period mentioned in subsection 13(1), to a State/Territory Minister;
> (b) the directors of an interjurisdictional authority to give written particulars of a proposal mentioned in subsection 15(1) to a State/Territory Minister;
> (c) a State/Territory Minister to give written guidelines under subsection 15(2) to the directors of an interjurisdictional authority;
> (d) the directors of an interjurisdictional authority:
> (i) to keep a State/Territory Minister informed of the operations of the authority and its subsidiaries; or

[206] See, for example, Legal and Constitutional Affairs Committee, Senate, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1996) pp 248-299.
[207] See generally Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (1998).
[208] See CoAG Reform Council, *Charter* (2010). See also Andrew Parkin and Geoff Anderson, 'The Howard Government, Regulatory Federalism and the Transformation of Commonwealth-State Relations' (2007) 42 *Australian Journal of Political Science* 295.
[209] See generally Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (1998). See also Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2008-09 (2008) p 11.
[210] See Campbell Sharman, 'Executive Federalism' in Brian Galligan, Owen Hughes and Cliff Walsh (eds), *Intergovernmental Relations and Public Policy* (1991) p 25.
[211] See *Financial Framework Legislation Amendment Act 2010* (Cth) s 3 and sch 8 (item 5).
[212] See *Financial Framework Legislation Amendment Act 2010* (Cth) s 3 and sch 5 (item 10).

> (ii) to give a State/Territory Minister the reports, documents and information in relation to those operations that the State/Territory Minister requires, within the time limits set by the State/Territory Minister;

Most recently the Joint Committee of Public Accounts and Audit' (JCPAA) inquired into the activities of the Auditor-General, and in particular, 'the Auditor-General's authority to "follow the money trail"'.[213] This was considered necessary as there is presently no authority under the *Auditor-General Act 1997* (Cth) for the Auditor-General to examine the financial and performance outcomes of Commonwealth grants made to State and Local governments (or even Commonwealth payments to the private sector).[214] The JCPAA recommended that '*all* funding agreements' (emphasis added) involving Commonwealth money should 'include standard clauses providing the Auditor-General with access to all information and records, and a capacity to inspect work on all projects, relating to the use of Commonwealth funds under those agreements'.[215] Further, the JCPAA recognised that there might be some complex legal and constitutional issues with such a requirement (specifically with the sharing of information and data) and recommended that the *Auditor-General Act 1997* (Cth) be amended so that:

> … the Auditor-General may conduct a performance audit to directly assess the performance of bodies that receive Commonwealth funding in circumstances where there is a corresponding or reciprocal responsibility to deliver specified outcomes in accordance with agreed arrangements if a Minister or the [JCPAA] requests the audit.[216]

The JCPAA's report indicates that there is likely to be an expanding role and place for the Auditor-General in cross-jurisdictional arrangements.

[213] Joint Committee of Public Accounts and Audit, *Inquiry into the Auditor-General Act 1997*, Report No 419 (2010) pp xi and 57.
[214] Joint Committee of Public Accounts and Audit, *Inquiry into the Auditor-General Act 1997*, Report No 419 (2010) p 57.
[215] Joint Committee of Public Accounts and Audit, *Inquiry into the Auditor-General Act 1997*, Report No 419 (2010) p 64.
[216] Joint Committee of Public Accounts and Audit, *Inquiry into the Auditor-General Act 1997*, Report No 419 (2010) p 67.

5. Executive power

5.1 Introduction

At its most basic, executive power is an emanation of the *Constitution* through the Queen,[1] the Governor-General,[2] the 'Governor-General in Council',[3] or from legislation made by Parliament conferring powers on the Executive under the authority of the *Constitution*.[4] Thus:

> The Executive authority, in the system of government established by the Federal *Constitution*, includes all those discretionary or mandatory acts of government which can be lawfully done or permitted by the Executive Government, in pursuance of powers vested in it, or in pursuance of duties imposed upon it partly by the *Constitution* and partly by Federal legislation. Generally described, the powers and duties of the Federal Executive Government relate to the execution and maintenance of the *Constitution* and the execution and maintenance of the laws of the Federal Parliament, passed in pursuance of the Federal *Constitution*.[5]

Perhaps more accurately, executive power has a broad and undefinable ambit, albeit 'within the ultimate bounds of law':[6]

> In speaking of the Executive Government, then, the term 'Executive' must be understood in a very broad sense; and we are not to expect a complete statement of the functions of the Government in a single instrument. For more than one reason Statutes defining the Constitutions of the Colonies have been almost silent on the subject of the powers as of the organisation of the Executive. In the first place, the legislative power has included the power of making full provision for the execution of the law. Secondly, a large measure of executive power resides in the prerogative of the Crown, and has been conferred through prerogative acts and not by Statute, lest thereby the prerogative should be prejudiced. Finally, the organisation of the Government, and the relations of the Ministry and Parliament in our system, are a very type of matters which are not under the continual direction of organic laws, but are freely organised as utility has suggested, or may suggest, within the ultimate bounds of law.[7]

Thus, the *Constitution* s 2 provides:

> A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this *Constitution*, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

And the *Constitution* s 61 then provides:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.

And further, *Constitution* s 51(xxxix) provides:

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[1] See *Constitution* ss 2, 59, 61 and 126.

[2] See *Constitution* ss 2, 5, 21, 28, 56, 57, 58, 62, 64, 65, 68, 69, 70, 126 and 128. An ongoing controversy reflects the contention that the drafters of the *Constitution* intended that all the powers (except the few 'reserve powers') vested in the Governor-General be exercised on advice giving effect to the conception of 'responsible government', while the contrary proposition is that the *Constitution* vests some powers in the 'Governor-General in Council' and others in the 'Governor-General' so that, as a matter of construction, some powers are exercised on advice and others personally: compare, for example, George Winterton, *Parliament, The Executive and The Governor-General: A Constitutional Analysis* (1983) pp 13-17 and W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) pp 166-167.

[3] See *Constitution* ss 32, 33, 64, 67, 70, 72, 83, 85(i) and 103.

[4] See, for examples, *Constitution* ss 51, 52 and 61. See also W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) p 294. Notably, there may also be an obligation to protect the States against invasion, and at the request of a State, against domestic violence: *Constitution* s 119.

[5] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 699.

[6] W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) p 294.

[7] W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) p 294.

> The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to … (xxxix) matters incidental to the execution of any power vested by this *Constitution* in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

This apparently simple prescription is clouded by the haze of evolving conventions and actors through which these powers may be exercised. The evolution of executive power traces from the time of Federation when it was almost certainly accepted that the Commonwealth had the status of a self-governing colony of the British Empire, with a significant role for the Crown and the British Government.[8] Thus, at the time of Federation, and for some time after Federation, some of the Crown's prerogatives were exercised on advice of the British Government, including the power to execute treaties and declare war.[9] The consequence was that there was a distinction between those executive powers assigned by the King and exercised by the Governor-General and those limited to being exercised by the King alone, so that not all executive powers were sourced from the *Constitution* s 61.[10] Over the decades, however, the Commonwealth has developed a more independent status and the emanations of executive power in the *Constitution* reflect these developments:[11]

> Whilst the new Commonwealth was upon its creation the Australian colony within the Empire, the grant of the power with respect to external affairs was a clear recognition, not merely that, by uniting, the people of Australia were moving towards nationhood, but that it was the Commonwealth which would in due course become the nation state, internationally recognized as such and independent. The progression from colony to independent nation was an inevitable progression, clearly adumbrated by the grant of such powers as the power with respect to defence and external affairs. Section 61, in enabling the Governor-General as in truth a Viceroy to exercise the executive power of the Commonwealth, underlines the prospect of independent nationhood which the enactment of the *Constitution* provided. That prospect in due course matured, aided in that behalf by the Balfour Declaration and [in 1931] the *Statute of Westminster* and its adoption [from 1939].[12]

In recent times the *Constitution* s 61 is credited as the sole source of executive power,[13] including the prerogatives[14] (and 'capacities'),[15] so that:[16]

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[8] See *Attorney-General for the Commonwealth v T & G Mutual Life Society Ltd* (1978) 144 CLR 161 at 195-196 (Aickin J); *New South Wales v Commonwealth* (1975) 135 CLR 337 at 373 (Barwick CJ), 444 (Stephen J), 469 (Mason J). See also John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p vii; A Lefroy, 'Commonwealth of Australia Bill' (1899) 15 *Law Quarterly Review* 155 at 161; A Lefroy, 'Commonwealth of Australia Bill' (1899) 15 *Law Quarterly Review* 281 at 282-283; Jethro Brown, 'The Australian Commonwealth Bill' (1900) 16 *Law Quarterly Review* 35 at 24-27; Harrison Moore, 'The Commonwealth of Australia Bill' (1900) 16 *Law Quarterly Review* 35 at 36-38.

[9] See, for examples, *Welsbach Light Company of Australasia Limited v Commonwealth* (1916) 22 CLR 268 at 278-279 (Barton J); *Farey v Burvett* (1916) 21 CLR 433 at 452 (Isaacs J).

[10] See, for examples, *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 432 (Knox CJ and Gavin Duffy J), 453-454 (Higgins J); *Farey v Burvett* (1916) 21 CLR 433 at 452 (Isaacs J); *R v Sutton* (1908) 5 CLR 789 at 805 (O'Connor J).

[11] See, for examples, *Sue v Hill* (1999) 199 CLR 462 at 496 (Gleeson CJ, Gummow and Hayne JJ and the references therein), 526-527 (Gaudron J); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); *South Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 at 261; (Gibbs J); *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 195 (Gibbs J), 208-213 (Stephen J); *Attorney-General for the Commonwealth v T & G Mutual Life Society Ltd* (1978) 144 CLR 161 at 195-197 (Aickin J). Notably, the Executive power may also expand so that the 'written words have to take into account the circumstances of the moment and the extent of constitutional development': *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 446 (Isaacs J).

[12] *New South Wales v Commonwealth* (1975) 135 CLR 337 at 373 (Barwick CJ). See also George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421 at 422; George Winterton, 'The Acquisition of Independence' and Geoff Lindell, 'Further Reflections on the Date of the Acquisition of Australia's Independence' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) pp 31-50 and 51-59 respectively.

[13] It might be argued that there are some prerogative powers exercisable only by the Queen outside the ambit of the *Constitution* s 61 as a consequence of the early recognition by the High Court that some prerogatives were not exercisable by the Governor-General: see George Winterton, *Parliament, The Executive and the Governor-General: A Constitutional Analysis* (1983) pp 23-26 and the references therein; A Lefroy, 'Commonwealth of Australia Bill' (1899) 15 *Law Quarterly*

> [The *Constitution* s 61] confers on the Commonwealth all the prerogative powers of the Crown except those that are necessarily exercisable by the States under the allocation of responsibilities made by the *Constitution* and those denied by the *Constitution* itself.[17]

The *Constitution* s 2 seems to have become either irrelevant or perhaps confined to addressing the Queen's powers outside the Commonwealth's sphere,[18] such as the Queen's prerogatives in respect of the States.[19] The content of executive power traceable to the *Constitution* s 61 now appears to be something like all the power necessary to pursue 'all executive action which is appropriate to the position of the Commonwealth under the *Constitution* and to the spheres of responsibility vested in it by the *Constitution*',[20] and 'a capacity to engage in enterprises and activities peculiarly adapted to the

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Review 281 at 282-283. See also Harrison Moore, 'The Commonwealth of Australia Bill' (1900) 16 *Law Quarterly Review* 35 at 36-38. For other contrary analyses see John Goldring, 'The Impact of Statutes on the Royal Prerogative: Australasian Attitudes as to the Rule in Attorney-General v De Keyser's Royal Hotel Ltd' (1974) 48 *Australian Law Journal* 434 at 436. Other prerogatives that might otherwise have been read into the *Constitution* s 61 include ss 5, 28, 32, 56, 62, 64, 67, 68, 70 and 72: see Enid Campbell, 'Parliament and the Executive', in Leslie Zines (ed), *Commentaries on the Australian Constitution* (1977) p 89. See also Simon Evans, 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Public Law Review* 94 at 96-99; D Dawson, 'Commonwealth prerogatives' in Cheryl Saunders, Michael Crommelin, M H Byers, M F Gray, D Dawson and R C Jennings (eds), *Current Constitutional Problems in Australia* (1982) pp 62-67.

[14] See *Cadia Holdings Pty Ltd v New South Wales* [2010] HCA 27 at [30] (French CJ), [86] (Gummow, Hayne, Heydon And Crennan JJ); *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 60 (French CJ), 83 (Gummow, Crennan and Bell JJ); *Brown v West* (1990) 169 CLR 195 at 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Davis v Commonwealth* (1988) 166 CLR 79 at 93-94 (Mason CJ, Deane and Gaudron JJ), 110 (Brennan J); *New South Wales v Commonwealth* (1975) 135 CLR 337 at 373 (Barwick CJ), 379 (McTiernan J), 498 (Jacobs J); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 405 (Jacobs J); *Johnson v Kent* (1975) 132 CLR 164 at 169 (Barwick CJ), 174 (Jacobs J); *Barton v Commonwealth* (1974) 131 CLR 477 at 491 (McTiernan and Menzies JJ), 498 (Mason J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 230 (Williams J); *In Re Richard Foreman & Sons Pty Ltd; Uther v Commissioner of Taxation* (1947) 74 CLR 508 at 531 (Dixon J); *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 303 (Dixon J), 322 (Evatt J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643-644 (Latham CJ), 683-684 (Evatt and McTiernan JJ); *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437-439 (Isaacs J), 461 (Starke J); and so on. This proposition is not universally accepted: see *Commonwealth v Tasmania* (1983) 158 CLR 1 at 299 (Dawson J). Notably some prerogatives powers are vested in the Attorney-General as first law officer of the Crown, including the power to grant a fiat to a relator action, to enter an *ex officio* indictment and to withdraw a prosecution: see *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 574-575 (Gaudron, Gummow and Hayne JJ) and the references therein, especially *Question of Law* (1996) 66 SASR 450 (Debelle J). See also R Plehwe, 'The Attorney-General and Cabinet: Some Australian Precedents' (1980) 11 *Federal Law Review* 1. Others offices with vested powers include the sheriffs, coroners, constables and justices of the peace: see Harold Renfree, *The Executive Power of the Commonwealth of Australia* (1984) p 24.

[15] The 'capacities' of the Executive that reside in the *Constitution* s 61 remain contested, particularly those based in the necessities of a modern national government: see *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 60-61 (French CJ). At its core this is a division between those non-legislated prerogatives vested in the Executive that are in common with everyone (such as the capacity to enter contracts) and those that are powers (rights, privileges and immunities) exercisable by the Executive alone (such as the power to enter treaties): see *Davis v Commonwealth* (1988) 166 CLR 79 at 108 (Brennan J). This result drew a distinction between 'capacities' (and 'functions') of the Crown in right of the Commonwealth and the 'exercise of its capacities' (and 'functions'): *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424 (Brennan CJ), 438-439 (Dawson, Toohey and Gaudron JJ).

[16] In the early years of the Commonwealth it seems some common law prerogatives were not considered to be within the authority of the *Constitution* s 61: see *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 453-454 (Higgins J); *Farley v Burvett* (1916) 21 CLR 433 at 452 (Isaacs J). See also Leslie Zines, 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (1977) pp 22-25.

[17] *Davis v Commonwealth* (1988) 166 CLR 79 at 93 (Mason CJ, Deane and Gaudron JJ) citing *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437-439 (Isaacs J).

[18] The apparent reason for the separate provisions in the *Constitution* ss 2 and 61 was to address certain difficulties encountered in other colonies: see W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) p 89; John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 390. See also Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) pp 340-343.

[19] See George Winterton, *Parliament, The Executive and the Governor-General: A Constitutional Analysis* (1983) p 52. See also Bradley Selway, 'All at Sea – Constitutional Assumptions and "The Executive Power of the Commonwealth"' (2003) 31 *Federal Law Review* 495 at 502-504 and the references therein.

[20] *Barton v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J).

government of a nation and which cannot otherwise be carried on for the benefit of the nation'.[21] Unfortunately the actual content of these propositions, and others like them, remains unsettled. This chapter surveys the current nature and scope of executive powers emanating from the *Constitution* s 61 demonstrating that the scope of this power remains to be comprehensively determined and that its elucidation is still evolving.

5.2 The meaning of the plain text of the *Constitution* s 61

The plain text of the *Constitution* s 61 does not provide a definition of the executive power of the Commonwealth; instead it is the 'constitutional domain'[22] or 'the field of executive power'[23] that is described by the text.[24]

(a) *'executive power of the Commonwealth'* – distinguishing between the Federal executive power and those powers reserved for the States.[25] In essence this is a distinction between the 'Crown in right of the Commonwealth' and the 'Crown in right of the States'.[26]

(b) *'vested in the Queen'* – reflecting the theory of the British Constitution that the 'source and fountain' of executive power is the Crown and that governmental actions are done by, or in the name of, the Crown.[27]

(c) *'exercisable by the Governor-General as the Queen's representative'* – reflecting the role of the Governor-General as the Queens representative empowered to act within the bounds of the powers and functions assigned to the Governor-General by the Queen[28] and by the *Constitution*.[29]

(d) *'extends to the execution and maintenance of this Constitution'* – meaning 'the doing of something immediately prescribed or authorised by the *Constitution* without the intervention of Federal legislation',[30] and might include 'the provision of what is necessary or convenient for the functioning of Parliament'.[31] Further, within the phrase 'maintenance of this *Constitution*' there is the 'idea of Australia as a nation within itself and in its relationship with the external world',[32] that will include matters corresponding with a national identity[33] like 'to establish

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21 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J).

22 *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 440 (Isaacs J).

23 *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 461 (Starke J).

24 See *Commissioner of Taxation (Cth) v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 321 (Evatt J); *R v Hush; ex parte Devanny* (1932) 48 CLR 487 at 511 (Evatt J); *Le Mesurier v Connor* (1929) 42 CLR 481 at 514 (Isaacs J). For an overview of the various contributions at the Constitutional Convention and related texts: see *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 56-60 (French CJ).

25 John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 701. See also *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 440-441 (Isaacs J).

26 John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 701-702.

27 John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 702. See also *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437 (Isaacs J).

28 See *Constitution* s 2.

29 John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 702. See also *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437 (Isaacs J), 453-454 (Higgins J).

30 *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 432 (Knox CJ and Gavan Duffy J). See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 230 (Williams J).

31 *Brown v West* (1990) 169 CLR 195 at 201 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

32 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 406 (Jacobs J).

33 See *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 370 (McTiernan J), 397 (Mason J), 412-413 (Jacobs J), 424 (Murphy J).

the Commonwealth Scientific and Industrial Research Organization to undertake scientific research on behalf of the nation',[34] to 'expend money on inquiries, investigation and advocacy in relation to matters affecting public health',[35] 'short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole, where such measures are on their face peculiarly within the capacity and resources of the Commonwealth Government',[36] and it 'conveys the idea of the protection of the body politic or nation of Australia'.[37]

(e) *'extends to the execution and maintenance … of the laws of the Commonwealth'* – meaning 'the doing and the protection and safeguarding of something authorised by some law of the Commonwealth made under the *Constitution*'.[38] The 'laws of the Commonwealth' means the legislation and subordinate legislation enacted under the authority of the Commonwealth Parliament.[39]

There are no High Court judgments, or series of judgments, that provide a comprehensive statement of the full extent of the powers and capacities of the Executive.[40] It appears that the text finally adopted in the *Constitution* s 61 was intended to confer very broad powers on the Executive, and that these include the powers conferred on the Executive by statute, the prerogatives of the Crown, and the various 'capacities' possessed by persons other than the Crown:[41] '[t]he content of the executive power of the Commonwealth was not defined nor in terms limited by the drafters of the *Constitution*'.[42] The result is that the interpretation of the text of s 61 to determine the exact nature and scope of the 'executive power of the Commonwealth' does have to be made. It is, however, only the meaning of the phrase 'extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth' that remains contentious.[43] The High Court's various decisions provide some indication of the scope and content of this power (addressed further below), but there is no definitive statement.[44]

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[34] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J).

[35] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J) citing *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 257 (Latham CJ).

[36] *Pape v Commissioner of Taxation* (2009) 238 CLR at 63 (French CJ). Notably Chief Justice French cautioned: '[t]o say that the Executive power extends to the short-term fiscal measures in question in this case does not equate it to a general power to manage the national economy' (at 63).

[37] *Pape v Commissioner of Taxation* (2009) 238 CLR at 83 (Gummow, Crennan and Bell JJ).

[38] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 230 (Williams J). See also *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643-644 (Latham CJ).

[39] *Sankey v Whitlam* (1978) 142 CLR 1 at 30 and 31 (Gibbs ACJ), 73 (Stephen J), 92 (Mason J), 104-105 (Aickin J); *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431-432 (Knox CJ and Gavan Duffy J). See also *Constitution of the Commonwealth of Australia Act 1900* (UK) s 5.

[40] The High Court has, indeed, been reluctant to provide any definitive statement about the nature and scope of 'executive power' in the context of the *Constitution*, almost certainly because the provision is not amenable to exhaustive definition: see *Davis v Commonwealth* (1988) 166 CLR 79 at 92-93 (Mason CJ, Deane and Gaudron JJ), 107 (Brennan J); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J). See also George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421 at 423-433.

[41] See *Pape v Commissioner of Taxation* (2009) 238 CLR at 60 (French CJ).

[42] *Pape v Commissioner of Taxation* (2009) 238 CLR at 59 (French CJ). See also Michael Crommelin, *The Commonwealth Executive: A Deliberate Enigma* (1986) pp 36-37.

[43] See also George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421 at 422.

[44] And there is unlikely to ever be a definitive statement about its scope and content: see *Pape v Commissioner of Taxation* (2009) 238 CLR at 59 (French CJ); *R v Hughes* (2000) 202 CLR 535 at 554-555 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Davis v Commonwealth* (1988) 166 CLR 79 at 92 (Mason CJ, Deane and Gaudron JJ), 107 (Brennan J).

5.3 The exercise of executive power

The *Constitution* s 61 expressly provides that the 'executive power of the Commonwealth' is 'exercisable' by the Governor-General 'as the Queen's representative'.[45] The *Constitution* makes no provision for the means or methods of exercising executive power,[46] presumably leaving this entirely to the Queen's discretion, through her representatives and following advice were necessary,[47] *and* subject to the conceptions of 'responsible government'.[48] There will also be other instances where the executive power is exercise in carrying out the ordinary functions of government, such as entering into contracts.[49] Many other instances of the exercise of the executive power of the Commonwealth have been identified.[50] Problems may arise, however, where the 'executive power of the Commonwealth' might be exercised by the Governor-General *without* advice,[51] and where the

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[45] Notably, the Queen can exercise some of these powers personally when she is in Australia (presumably just visiting): see *Royal Powers Act 1953* (Cth) s 2.

[46] Notably, the exercise of the prerogatives is, as a general principle, not be reviewable by a court, although there appear to be exceptions: see, for example, *Barton v R* (1980) 147 CLR 75 at 90 and 95 (Gibbs ACJ and Mason J), 109 (Aickin J), 107 (Murphy J), 110-111 (Wilson J). See also Fiona Wheeler, 'Judicial Review of Prerogative Power in Australia: Issues and Prospects' (1992) 14 *Sydney Law Review* 432.

[47] Notably, the *Constitution* s 126 provides for the Queen to authorise the Governor-General to appoint others to exercise the powers and functions of the Governor-General. See also Commonwealth of Australia, *Gazette*, No S179, 9 September 2008 (Letters Patent).

[48] See *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 405-406 (Jacobs J); *King v Burgess; ex parte Henry* (1936) 55 CLR 608 at 635-636 (Latham CJ), 681-683 (Evatt and McTiernan JJ); *New South Wales v Commonwealth* (1915) 20 CLR 54 at 89 (Isaacs J).

[49] See, for example, *New South Wales v Bardolph* (1934) 52 CLR 455 at 496 (Rich J), 509 (Dixon J). See also Nicholas Seddon, *Government Contracts: Federal, State and Local* (4th ed, 2008).

[50] See, for examples, *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63 (French CJ), 92 (Gummow, Crennan and Bell JJ) (short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole); *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at 634-635 (Gummow and Hayne JJ) (extradition from Australia of fugitive offenders); *Bropho v Western Australia* (1990) 171 CLR 1 at 21 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (presumptive Crown servant immunity from legislation); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 193 (Gibbs CJ), 215 (Stephen J), 237 (Murphy J), 249-250 (Wilson J) (negotiation and entry into international agreements); *New South Wales v Commonwealth* (1975) 135 CLR 337 at 381 (McTiernan J), 503 (Murphy J) (negotiation and entry into international agreements); *Western Australia v Commonwealth* (1975) 134 CLR 201 at 223-224 (Barwick CJ), 233 (McTiernan J), 241-242 (Gibbs J), 252-254 (Stephen J), 266-267 (Mason J), 276-279 (Jacobs J), 288-289 (Murphy J) (prorogue, dissolve and summon the Parliament); *Johnson v Kent* (1975) 132 CLR 164 at 170 (Barwick CJ), 172 (McTiernan J), 172 (Stephen J), 174 (Jacobs J) (build recreational facilities); *Barton v Commonwealth* (1974) 131 CLR 477 at 485-486 (Barwick CJ), 491 (McTiernan and Menzies JJ), 498-499 (Mason J), 505 (Jacobs JJ) (request extradition of fugitives); *Marks v Commonwealth* (1964) 111 CLR 549 at 557 (Kitto J), 558 (Taylor J), 560 (Menzies J), 564 (Windeyer J), 591 (Owen J) (control and direct the armed forces); *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 377 (Dixon CJ) (presumptive immunity from legislation); *Lockwood v Commonwealth* (1954) 90 CLR 177 at 182 and 186 (Fullagar J) (conduct inquiries); *Re Richard Foreman and Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 514 (Latham CJ), 523 (Rich J), 525 (Starke J), 527-528 (Dixon J), 535 (McTiernan J), 537 (Williams J) (priority in the payment of debts); *Johnston Fear & Kingham v Commonwealth* (1943) 67 CLR 314 at 318 (Latham CJ), 325 (Starke J) (expropriate property in a defence emergency); *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 286 (Latham CJ), 291 (Rich J), 294 (Starke J), 303-304 (Dixon J), 319 and 323 (Evatt J) (priority in the payment of debts), 322 (Evatt J) (immunity from distress for rent); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 644 (Latham CJ), 683-684 (Evatt and McTiernan JJ) (negotiation and entry into international agreements); *New South Wales v Bardolph* (1934) 52 CLR 455 at 496 (Rich J), 509 (Dixon J) (enter contracts); *Repatriation Commission v Kirkland* (1923) 32 CLR 1 at 10 (Knox CJ and Starke J), 11-12 (Higgins J), 22 (Rich J) (immunity from distress for rent); *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 442 (Isaacs J) (authority to do extraordinary things in times of national danger; see also *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (expropriate property in a defence emergency)); *Joseph v Colonial Treasurer* (NSW) (1918) 25 CLR 32 at 45-47 (Isaacs, Powers and Rich JJ) (control of the armed forces); *Farey v Burvett* (1916) 21 CLR 433 at 452 (Isaacs J) (declare war and peace); *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 378 (O'Connor J) (conduct inquiries); and so on.

[51] As a general proposition the distinction in the *Constitution* between the Governor-General or the Governor-General in Council is of little consequence as a cornerstone of 'responsible government' dictates that the Governor-General must act with the advice of a Minister having the current support of the House of Representatives, except is some very rare cases: see, for example, Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) pp 85-86. See also *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 349 (Gibbs CJ), 355 (Stephen J), 364-365 (Mason J), 373 (Murphy J), 382-383 (Aickin J), 396-397 (Wilson J), 414-416 (Brennan J).

Parliament through 'laws of the Commonwealth' might dictate how the executive power is to be exercised.[52] These are considered in turn.

5.3.1 The reserve powers

The 'reserve powers' are those executive powers that might be exercised by the Governor-General *without* the advice, or contrary to the advice,[53] of the relevant Ministers.[54] These 'reserve powers' might be stated as:

> The scope of the reserve powers is uncertain and their use has proven contentious. This is in part because the Australian model of government relies on unwritten rules or 'conventions' to flesh out the 'bare bones' of the *Constitution*. It is thus (by convention) accepted that there must be an office of Prime Minister and a Cabinet even though their existence is not constitutionally mandated. Likewise, not all the powers of the Governor-General are codified in the written *Constitution* and many of them are similarly constrained by such unwritten rules. A further complication is the difficulty of determining when mere custom and practice attains the status of a convention.
>
> That said, it is generally accepted that the reserve powers of the Governor-General include:
>
> - the power to appoint a Prime Minister if an election results in a hung Parliament
> - the power to dismiss a Prime Minister in circumstances where the House of Representatives has passed a 'No Confidence' motion against the Prime Minister, and
> - the power to refuse to dissolve the House of Representatives contrary to Ministerial advice. The refusal by a Governor-General to dissolve House on Ministerial advice has been the most frequently used of the reserved powers in Australia.
>
> The more 'doubtful' reserve powers that arguably may also be held by the Governor-General are:
>
> - the power to refuse a double dissolution (although this has not been exercised in Australia on any of the six occasions when a double dissolution of Parliament has been requested)
> - the power to withhold assent to Bills that Parliament has passed and contrary to Ministerial advice (ie the power of veto)
> - the independent discretion to select a new Prime Minister in circumstances where the outgoing Prime Minister resigns after a defeat in the House of Representatives. It is argued that there is a convention which fetters the use of the Governor-General's power such that he or she is obliged to follow the advice of the resigning Prime Minister as to the suitable replacement. (The contrary argument is that such a convention would mean the demise of the reserve power leaving no independent discretion to act in the face of unlawful or clearly erroneous advice. On this view, the reserve power exists to allow the Governor-General discretion to reject advice of the resigning Prime Minister not given in good faith), and, lastly,
> - the power to dismiss a Prime Minister in circumstances where the Government cannot obtain supply and the Prime Minister refuses to resign or to call an election.[55]

A further distinction may also be important. The *Constitution* s 63 provides:

> The provisions of this *Constitution* referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

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[52] Commonwealth legislation can limit, abrogate or displace a prerogative to the extent of the *Constitution*'s legislative powers: see, for examples, *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424 (Brennan CJ), 438 (Dawson, Toohey and Gaudron JJ), 459 (McHugh J); *Brown v West* (1990) 169 CLR 195 at 202 and 204-205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Johnson v Kent* (1975) 132 CLR 164 at 170 (Barwick CJ); *Barton v Commonwealth* (1974) 131 CLR 477 at 484 (Barwick CJ), 501 (Mason J); and so on.

[53] The Minister being in a position to provide authoritative advice when they have the support of the House of Representatives: see Solomon Encel, *Cabinet Government in Australia* (2nd ed, 1974) pp 22-23.

[54] See Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) pp 341-342. For an early analysis of the 'reserve powers' relevant in Australia: see Herbert Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (2nd ed, 1967).

[55] Susan Downing, *The Reserve Powers of the Governor-General*, Parliamentary Library Research Paper Research Note 25 (1997). See also George Winterton, *Parliament, The Executive and The Governor-General: A Constitutional Analysis* (1983) pp 196-198 and the references therein; Harold Renfree, *The Executive Power of the Commonwealth of Australia* (1984) pp 30-32.

The powers exercised by the Governor-General *without* the advice, or contrary to the advice, of the relevant Ministers (that are part of the 'Federal Executive Council')[56] are those powers exercised by the Governor-General personally.[57] The distinction is most probably important as a matter of form – the Governor-General acting as the Governor-General in Council makes orders, proclamations, notices, rules, and so on. In practice, however, the Governor-General will probably seek the advice of the Prime Minister so as to avoid a political coup[58] or to comply with the conventions of 'responsible government'.[59]

The question remains, however, about the scope of the reserve powers of the Crown (and Governor-General). That is, those matters on which the Governor-General is not required to act in accordance with Ministerial advice. These are probably now limited to: appointing a Prime Minister (s 64); dismissing a Prime Minister (s 64); forcing dissolution of the Parliament (ss 5 and 57); and refusing to dissolve the Parliament (ss 5 and 57).[60] There are, however, 'conventions' applying to the exercise of these reserve powers and these remain contentious.[61]

5.3.2 Exercising the 'laws of the Commonwealth'

The 'laws of the Commonwealth' are the laws enacted under the authority of the Commonwealth Parliament.[62] Thus, there seems little doubt that legislation can direct the exercise of executive power,[63] albeit the legislation needs to be a valid law within the boundaries of the *Constitution*.[64] These might include laws based on any of the *Constitution*'s enumerated powers and the incidental power.[65] In exercising the power founded in the legislation, however, the Executive must follow the

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[56] There may be some circumstances where the advice of a single Minister alone is sufficient: see Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) p 341 and the references therein.

[57] See *Sue v Hill* (1999) 199 CLR 462 at 494 (Gleeson CJ, Gummow and Hayne JJ) and the reference therein. See also Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) pp 341-342 and the references therein.

[58] The circumstances surrounding the 1975 dismissal provided a good illustration of the Governor-General exercising his personal powers without consulting the then Prime Minister: see, for example, Ian Harris, *House of Representatives Practice* (5th ed, 2005) pp 462-467. Notable the literature on the '1975 crises' is considerable and there does not appear to be a consensus about the scope and content of the Governor-General's powers that might be exercised without advice. See also George Winterton, '1975: The Dismissal of the Whitlam Government' in H P Lee and George Winterton, *Australian Constitutional Landmarks* (2003)

[59] So, for example, while the *Constitution* s 68 confers command of the naval and military forces in the Governor-General, albeit that the Governor-General's 'command' is merely 'one of the oldest and most honoured prerogatives of the Crown, but it is now exercised in a constitutional manner' so that it is 'command' with 'the advice of his Ministry having the confidence of Parliament': John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 713.

[60] George Winterton, 'The Evolving Role of the Governor-General' in Matthew Groves (ed), *Law and Government in Australia* (2005) pp 44-58; Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) p 342. See also Susan Downing, *The Reserve Powers of the Governor-General*, Parliamentary Library Research Paper Research Note 25 (1997).

[61] See Susan Downing, *The Reserve Powers of the Governor-General*, Parliamentary Library Research Paper Research Note 25 (1997); Constitutional Commission, *Final Report of the Constitutional Commission*, Volume 1 (1988) p 342 and the references therein. See also *Sue v Hill* (1999) 199 CLR 462 at 494 (Gleeson CJ, Gummow and Hayne JJ).

[62] *Sankey v Whitlam* (1978) 142 CLR 1 at 30 and 31 (Gibbs ACJ), 73 (Stephen J), 92 (Mason J), 104-105 (Aickin J); *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 432 (Knox CJ and Gavan Duffy J).

[63] Whether the Parliament can direct Executive powers conferred other than by the *Constitution* s 61 has been contentious: see George Winterton, *Parliament, The Executive and The Governor-General: A Constitutional Analysis* (1983) pp 98-101. It seems likely that 'any Executive power expressly conferred by the *Constitution*' might be *controlled* by legislation subject to the provisions of the *Constitution*: see *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 406 (Jacobs J).

[64] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 230-231 (Williams J). See also George Winterton, *Parliament, The Executive and The Governor-General: A Constitutional Analysis* (1983) pp 94-101.

[65] Principally these will be the powers conferred by the *Constitution* ss 51 and 52(ii). However, the *Constitution* s 61 (with s 51(xxxix)) might itself be a basis for legislative power: see, for example, matters corresponding with a national identity such as establishing the Commonwealth Scientific and Industrial Research Organization under the *Science and Research Act 1951* (Cth) to undertake scientific research: see *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 370 (McTiernan J), 397 (Mason J), 412-413 (Jacobs J), 424 (Murphy J). See also *Pape v Commissioner of Taxation* (2009) 238

law: '[t]he Executive cannot change or add to the law; it can only execute it'.[66] Further, in exercising the s 51(xxxix) incidental powers:[67]

> As was said in *Re Wakim; Ex parte McNally*, '[n]o single formula will describe the relationship that must exist between a power or group of powers and some exercise of power that is said to be incidental to the execution of the principal power or is necessary or proper to render the main grant of power effective'. But both the central idea and the generality of the incidental power are stated by Marshall CJ in *McCulloch v Maryland*, cited with approval in *Grannall v Marrickville Margarine Pty Ltd*:
>
> > 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional'.
>
> It would be wrong to read the incidental power as having some narrow or confined application in connection with the execution of powers vested by the *Constitution* in the Government of the Commonwealth.[68]

There remains a possibility that the *Constitution* s 61 specifically requires that the executive power be exercised by the Governor-General, and that the other actors exercise the power according to a delegation or authorisation. This does not seem to be necessary, because as a matter of practice, the Parliament confers executive powers on a range of other actors including Ministers, public servants, and various others.[69]

5.4 The extent of executive power

The extent of the Commonwealth's executive power is not clearly defined in the *Constitution*: 'Chapter II [of the *Constitution*] vests the executive power of the Commonwealth in the Sovereign, and is … a generic term. Its specific limits have to be determined *aliunde*'.[70] That is, the *Constitution* s 61 does not itself provide a readily discernable statement of the content of executive power and this must be derived from general principles of constitutional law.[71] The problem is balancing the two competing considerations:

> On the one hand, there is the practical imperative of leaving with executive government adequate powers and sufficient administrative discretion to conduct the affairs of state as they arise. On the other hand, the executive power must not be so open ended as to allow for arbitrary action. The High Court has shown an abiding concern

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CLR 1 at 63-64 (French CJ), 92 (Gummow, Crennan and Bell JJ), 120-121 (Hayne and Kiefel JJ); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 108 (Gibbs CJ), 203 (Wilson J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 231 (Williams J); *R v Sharkey* (1949) 79 CLR 121 at 148-149 (Dixon J); *Burns v Ransley* (1949) 79 CLR 101 at 109-110 (Latham CJ); *Ex parte Walsh and Johnson; in re Yates* (1925) 37 CLR 36 at 94-95 (Isaacs J); *R v Kidman* (1915) 20 CLR 425 at 440-441 (Isaacs J).

[66] *R v Kidman* (1915) 20 CLR 425 at 441 (Isaacs J). See also, for recent examples, *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 592-593 (Gummow, Hayne and Crennan JJ); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 444 (Dawson, Toohey and Gaudron JJ); *Plenry v Dillon* (1991) 171 CLR 635 at 639 (Mason CJ, Brennan and Toohey JJ), 647-648 (Gaudron and McHugh JJ); *A v Hayden (No 2)* (1984) 156 CLR 532 at 562 (Murphy J), 580-581 (Brennan J).

[67] See also *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55 (French CJ), 92 (Gummow, Crennan and Bell JJ), 120 (Hayne and Kiefel JJ), 198-199 (Heydon J); and the cases addressed therein.

[68] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 120-121 (Hayne and Kiefel JJ).

[69] See, for examples, *Aston v Irvine* (1955) 92 CLR 353 at 364-365 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ); *R v Federal Court of Bankruptcy, ex parte Lowenstein* (1938) 59 CLR 556 at 590 (McTiernan J); *R v Macfarlane, ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 533 (Knox CJ); *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 376 (O'Connor J).

[70] *Le Mesurier v Connor* (1929) 42 CLR 481 at 514 (Isaacs J). See also *R v Hush; ex parte Devanny* (1932) 48 CLR 487 at 511 (Evatt J); *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 440-441 (Isaacs J).

[71] See *R v Hush; ex parte Devanny* (1932) 48 CLR 487 at 511 (Evatt J); *Le Mesurier v Connor* (1929) 42 CLR 481 at 514 (Isaacs J); *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437-438 (Isaacs J). An approach adopted by the High Court appears to have been to determine whether the necessary power is within the domain of the Commonwealth set by the confines of the constitutional grant to the Commonwealth (the breadth), and then, whether the power has been exercised lawfully (the depth): see George Winterton, *Parliament, The Executive and The Governor-General: A Constitutional Analysis* (1983) pp 29-31.

> that resort to the executive power could, if not circumscribed, become a device for the Commonwealth impinging on or eroding the rights and functions of the States (footnote omitted).[72]

The High Court authorities addressing the problem areas might be categorised as those dealing with powers accorded to the Queen as prerogatives and those based on the existence and character of the Commonwealth. The direction from the High Court remains incomplete, with there being no exhaustive definition of the prerogatives,[73] and over time, an expansion of the scope of the apparent executive powers within the *Constitution*.[74] These developments provide some insight into the likely boundaries of the executive power and the likely approach to resolving issues about the extent of executive power, albeit that it is not controversial that the extent of executive power is confined by the *Constitution* and what may be authorised by the *Constitution*.[75] Thus, the extent of executive power depends on the powers from the sources of (a) Imperial statutes in addition to the *Constitution*, (b) authority from what the *Constitution* imports, and (c) authority from what the *Constitution* says.[76] These are considered in turn.

5.4.1 Imperial statutes in addition to the Constitution

Any uncertainty about the common law and statutes extending to the Australian colonies[77] was settled by the *Australian Courts Act 1828* (Imp) that provided for the application in the Australian colonies at 25 July 1828 of 'all Laws and Statutes in force within the Realm of England at the Time of the passing of this Act … so far as the same can be applied'.[78] As a consequence the common law and statutes of England in force in England were received in New South Wales and Tasmania (Van Diemen's Land) at 25 July 1828.[79] South Australia received the English common law and statutes as at 28 December 1836 [80] and Western Australia at 1 June 1829.[81] Victoria received the New South Wales (including the English) common law and statutes at 1 July 1851,[82] and then Queensland at 6 June 1859.[83]

The *Colonial Laws Validity Act 1865* (Imp) established the authority of the United Kingdom Parliament to extend its legislation to the Australian colonies.[84] The *Australian Constitutions Act 1842* (Imp) preserved the authority of the United Kingdom Government to scrutinise and disallow the legislation of each of the colonial legislatures.[85] For the States these measures ceased to have effect

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[72] Max Spry, *The Executive Power of the Commonwealth: Its Scope and Limits*, Parliamentary Research Paper No 28 1995-1996 (1996) p 8.

[73] See *Barton v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J).

[74] This has been most apparent with the development of the nationhood powers: see, for examples, *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63 (French CJ), 89 (Gummow, Crennan and Bell JJ), 115-116 (Hayne and Kiefel JJ); *R v Hughes* (2000) 202 CLR 535 at 554-555 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Davis v Commonwealth* (1988) 166 CLR 79 at 93 (Mason CJ, Deane and Gaudron JJ), 110-111 (Brennan J); *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535 at 560 (Mason J); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 108 (Gibbs CJ), 203 (Wilson J); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 370 (McTiernan J), 397 (Mason J), 412-413 (Jacobs J), 424 (Murphy J); *Barton v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J), 505 (Jacobs J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643-644 (Latham CJ).

[75] See, for example, *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 362 (Barwick CJ), 379 (Gibbs J), 396 (Mason J), 405-406 (Jacobs J).

[76] For this characterisation see *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437 (Isaacs J).

[77] There being a presumption until the decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 that Australia was 'a tract of territory, practically unoccupied, without settled inhabitants or settled land, at the time when it was peacefully annexed to the British dominions': *Cooper v Stuart* (1889) 14 App Cas 286 at 291.

[78] *Australian Courts Act 1828* 9 Geo 4 c 83 (Imp) s 24. See also *Quan Yick v Hinds* (1905) 2 CLR 345 at 353-356 (Griffith CJ), 365-368 (Barton J), 378-379 (O'Connor J).

[79] *Australian Courts Act 1828* (Imp) s 24.

[80] See *Acts Interpretation Act 1915* (SA) s 48.

[81] See *Interpretation Act 1984* (WA) s 73.

[82] *Australian Constitutions Act 1850* (Imp) s 1.

[83] *Australian Constitutions Act 1850* (Imp) s 34.

[84] *Colonial Laws Validity Act 1865* (Imp) s 2.

[85] *Australian Constitutions Act 1842* (Imp) s 32.

with the *Australia Act 1986* (Cth) and *Australia Act 1986* (UK).[86] For the Commonwealth, however, the *Statute of Westminster Adoption Act 1942* (Cth) adopted parts of the *Statute of Westminster 1931* (Imp) with effect from 3 September 1939 to cease the operation of the *Colonial Laws Validity Act 1865* (Imp).[87] The result was that the Commonwealth Parliament could make laws 'repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act', together with the power 'to repeal or amend any such Act, order, rule or regulation' already in force in the Commonwealth.[88] A further consequence was to provide that no United Kingdom statute passed after the commencement of the *Statute of Westminster 1931* (Imp) would extend, or be deemed to extend, to Australia, unless it was expressly declared in the statute that Australia had requested and consented to the enactment.[89] This latter provision was repealed by the *Australia Act 1986* (Cth)[90] that established the complete independence of the Commonwealth Parliament (and State and Territory parliaments) so that '[n]o Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth'.[91] Clearly then, some Imperial statutes will apply, although which ones and their extent of application will be a matter of speculation and argument. Despite this uncertainty this does not appear to be a significant problem.

5.4.2 Authority from what the Constitution *imports*

The extent of executive power imported by the *Constitution* according to the phrase 'executive power of the Commonwealth' is potentially expansive.[92] As an Act of the United Kingdom Parliament, the *Constitution* embraces the influence of British constitutional law and history, including the common law:[93]

> There are, of course, some implications, such as would arise in the ordinary process of construction, and such as, without inconsistency, spring from the fabric of the common law upon which all British statutory constitutions are imposed.[94]

The *Constitution* therefore incorporates the powers of the Crown under the common law (including the prerogative powers)[95] and 'such powers and functions of the Queen as Her Majesty may be

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[86] *Australia Act 1986* (Cth) s 3; *Australia Act 1986* (UK) s 3.

[87] *Statute of Westminster Adoption Act 1942* (Cth) s 3 adopted the *Statute of Westminster 1931* 22 & 23 Geo 5 c 4 (Imp) ss 2, 3, 4, 5 and 6.

[88] *Statute of Westminster Adoption Act 1942* (Cth) s 3 adopting the *Statute of Westminster 1931* 22 & 23 Geo 5 c 4 (Imp) s 2. See also *Colonial Laws Validity Act 1865* 28 and 29 Vic c 63 (Imp) ss 2-4.

[89] *Statute of Westminster Adoption Act 1942* (Cth) s 3 adopting the *Statute of Westminster 1931* 22 & 23 Geo 5 c 4 (Imp) s 4. The Australian requesting and consenting Acts are *Australia (Request and Consent) Act 1985* (Cth), *Christmas Island (Request and Consent) Act 1957* (Cth) and *Cocos (Keeling) Islands (Request and Consent) Act 1954* (Cth). See also *Copyright Owners Reproduction Society Ltd v EMI (Aust) Pty Ltd* (1958) 100 CLR 597 at 612 (Dixon CJ).

[90] *Australia Act 1986* (Cth) s 12. See also *Australia Act 1986* (UK) s 12.

[91] *Australia Act 1986* (Cth) s 1. See also *Australia Act 1986* (UK) s 1.

[92] Notably Chief Justice Griffith in *R v Kidman* (1915) 20 CLR 425 at 439 distinguished between the phrase 'the laws of the Commonwealth' used in the *Constitution* s 61 and the phrase 'any law of the Commonwealth' in the *Constitution* s 80 saying they were *not* synonymous, the former referring to the laws made by Parliament, and the proposition that the phrases 'Executive power of the Commonwealth' and 'the laws of the Commonwealth' used in the *Constitution* s 61 distinguish between the former addressing the prerogatives and the latter addressing the laws made by Parliament: see George Winterton, *Parliament, The Executive and The Governor-General: A Constitutional Analysis* (1983) pp 51.

[93] See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 457 (McHugh J); *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 521 (Latham CJ); *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 446-448 (Isaacs J).

[94] *Le Mesurier v Connor* (1929) 42 CLR 481 at 512 (Isaacs J). See also *In Re Richard Foreman & Sons Pty Ltd; Uther v Commissioner of Taxation* (1947) 74 CLR 508 at 521 (Latham CJ).

[95] *Davis v Commonwealth* (1988) 166 CLR 79 at 93 (Mason CJ, Deane and Gaudron JJ) citing *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437-439 (Isaacs J); *Barton v Commonwealth* (1974) 131 CLR 477 at 491 (McTiernan and Menzies JJ), 498 (Mason J); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 405-406 (Jacobs J); *In Re Richard Foreman & Sons Pty Ltd; Uther v Commissioner of Taxation* (1947) 74 CLR 508 at 531 (Dixon J). See also *Oates v Attorney-General* (2003) 214 CLR 496 at 513 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at

pleased to assign to [the Governor-General]'[96] and might include the Governor-General's commission,[97] other commissions,[98] Letters Patent,[99] and so on.[100] In practice, however, few of these powers and functions are now expressly granted,[101] perhaps as a consequence of the expansive view that the *Constitution* s 61 includes all the Crown's prerogatives so there was no longer any need to set out those powers expressly.[102] And where the prerogatives have been relied on they are generally exercised narrowly and on the advice of Ministers, as the decision in *Johnson v Kent* illustrates.[103]

Johnson v Kent (1975) 132 CLR 164

In *Johnson v Kent* the Commonwealth proposed building a tower in the Australian Capital Territory to accommodate a telecommunications tower that included a restaurant and viewing facility for the public.[104] The challenge was against building the restaurant and viewing facility, it being accepted that a tower for a telecommunications was within the *Constitution*'s ambit.[105] The argument was that the only sources of power must be statutory, and of the possible statutes, none authorised building the restaurant and viewing facility.[106] In finding the Commonwealth had the requisite power in the *Constitution* s 61 the various judgments relied on the prerogatives, and applied them narrowly to the Australian Capital Territory rather than more broadly to Australia.[107]

Chief Justice Barwick, with whom Justices McTiernan, Stephen and Jacobs agreed,[108] considered that building the restaurant and viewing facility was an 'integral part' of the building, and so the s 51(v) telecommunications power was not itself sufficient even though the intention was that the restaurant and viewing facility would reimburse the costs of building the tower: '[i]t is not sound doctrine that the Commonwealth may do anything that will help it to reimburse itself for moneys lawfully spent for its purposes'.[109] Chief Justice Barwick then considered that the Crown's

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438 (Dawson, Toohey and Gaudron JJ); *Gratwick v Johnson* (1945) 70 CLR 1 at 12 (Latham CJ); *R v Kidman* (1915) 20 CLR 425 at 440 (Griffith CJ). Presumably, not *all* the Queen's common law powers will be included, such as her prerogative powers in respect of the Church of England as a consequence of being the Crown of the United Kingdom of Great Britain and Northern Ireland. An elegant description of modern prerogatives: 'a discretionary power exercisable by the Executive government for the public good, in certain spheres of governmental activity for which law has made no provision': *Laker Airways v Department of Trade* [1977] 1 QB 643 at 705 (Denning LJ). Further, the prerogatives exercisable by the Crown in right of the Commonwealth will not include 'those that are necessarily exercisable by the States under the allocation of responsibilities made by the *Constitution* and those denied by the *Constitution* itself': *Davis v Commonwealth* (1988) 166 CLR 79 at 93 (Mason CJ, Deane and Gaudron JJ).

96 *Constitution* s 2.

97 Although the Governor-General's commission no longer includes explicit powers, albeit the potential remains: see Commonwealth of Australia, *Gazette*, No S181, 10 September 2008.

98 These include Royal Commissions, and so on. See also *Royal Commissions Act 1902* (Cth) s 1A.

99 Although the *Letters Patent* after 1984 have only addressed the appointment, albeit the potential remains to include explicit powers: see Commonwealth of Australia, *Gazette*, No S179, 9 September 2008. See also Commonwealth of Australia, *Gazette*, No S334, 24 August 1984 as amended.

100 See *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 453-454 (Higgins J).

101 Compare the *Letters Patent*, 29 October 1900 and amended in 1958 and *Royal Instructions*, 29 October 1900 and amended in 1902, 1920 and 1958 (Commonwealth of Australia, *Gazette*, No S334, 24 August 1984) with the current *Letters Patent*, 9 September 2008 and no *Royal Instructions* (Commonwealth of Australia, *Gazette*, No S179, 9 September 2008).

102 See George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421 at 425 (footnote 39). For an alternative view that the prerogatives may not be a part of the *Constitution*'s powers but the 'historical antecedent' see *Ruddock v Vadarlis* (2001) 110 FCR 491 at 538-539 (French J).

103 Other illustrative examples are *Oates v Attorney-General* (2003) 214 CLR 496 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ); *Barton v Commonwealth* (1974) 131 CLR 477 (Barwick CJ, McTiernan, Menzies, Mason and Jacobs JJ).

104 *Johnson v Kent* (1975) 132 CLR 164 at 168 (Barwick CJ).

105 *Johnson v Kent* (1975) 132 CLR 164 at 168-169 (Barwick CJ).

106 *Johnson v Kent* (1975) 132 CLR 164 at 168 (Barwick CJ).

107 *Johnson v Kent* (1975) 132 CLR 164 at 168 (Barwick CJ), 172 (McTiernan J), 172 (Stephen J), 174 (Jacobs J)

108 *Johnson v Kent* (1975) 132 CLR 164 at 172 (McTiernan J), 172 (Stephen J), 174 (Jacobs J).

109 *Johnson v Kent* (1975) 132 CLR 164 at 169 (Barwick CJ).

prerogatives in the *Constitution* s 61 included the 'traditional executive power broadly embraced in the description of "the prerogative"'.[110] These were exercisable over land in the Territory unaffected by the authority of the *Constitution* s 122 for the Territory to make its own laws, and unaffected by the status of the Territory as a land grant to the Commonwealth under the *Seat of Government Acceptance Act 1909* (Cth).[111] According to this proposition there was ample prerogative power for the Commonwealth to establish parks, gardens, sports grounds, and tourist facilities and so on, and including the building of a restaurant and viewing facility.[112] The only limitations might be a statute that limited the exercise of the prerogative and none could be found.[113] As no limitations were identified Chief Justice Barwick concluded that building the restaurant and viewing facility was authorised by the prerogative in the *Constitution* s 61.[114]

In short, the authority from what the *Constitution* imports comprises the prerogative powers that are exercisable by the Governor-General,[115] albeit these powers are limited because no new prerogatives can be created,[116] and where there is legislation in conflict with a prerogative then the legislation will prevail to limit, abrogate or displace a prerogative.[117] Two immediate problems arise: (i) determining the conferral and distribution of the prerogatives between the Commonwealth and the States, and (ii) determining when legislation ousts a prerogative. These are considered in turn.

Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq) (1940) 63 CLR 278

First, determining the prerogative powers actually conferred is complicated by the uncertain distribution of prerogatives between the Commonwealth and the States[118] (and the uncertain constitutional authority for the prerogatives).[119] This uncertain distribution was illustrated in *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* where both the Commonwealth and New South Wales claimed priority for the payment of debts in the winding up of a company

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110 *Johnson v Kent* (1975) 132 CLR 164 at 169 (Barwick CJ).

111 *Johnson v Kent* (1975) 132 CLR 164 at 169-170 (Barwick CJ).

112 *Johnson v Kent* (1975) 132 CLR 164 at 170 (Barwick CJ).

113 *Johnson v Kent* (1975) 132 CLR 164 at 170 (Barwick CJ).

114 *Johnson v Kent* (1975) 132 CLR 164 at 170 (Barwick CJ).

115 Early High Court authority showed that certain powers of the Crown were unable to be exercised by the Governor-General (see, for examples, *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 453-454 (Higgins J); *Zachariassen v Commonwealth* (1917) 24 CLR 166 at 186 (Gavan Duffy J)), although recent decisions appear to provide that the Crown's prerogative is within the ambit of the *Constitution* s 61 power (see, for examples, *Barton v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 405-406 (Jacobs J)). There are conceivably, however, some prerogatives outside the scope the Commonwealth's Executive power: see *Brown v West* (1990) 169 CLR 195 at 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

116 See *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* (1982) 152 CLR 25 at 69 (Stephen J), 139 (Wilson J), 155 (Brennan J); *Barton v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J); *Australian Communist Party v Commonwealth* (1951 83 CLR 1 at 230 (Williams J); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 143 (Knox CJ, Isaacs, Rich and Starke JJ).

117 See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424 (Brennan CJ), 438 (Dawson, Toohey and Gaudron JJ), 459 (McHugh J); *Brown v West* (1990) 169 CLR 195 at 202 and 204-205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Johnson v Kent* (1975) 132 CLR 164 at 170 (Barwick CJ); *Barton v Commonwealth* (1974) 131 CLR 477 at 484 (Barwick CJ), 501 (Mason J); *Re Foreman & Sons Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 514 (Latham CJ); *Commissioner of Taxation (Cth) v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 286-287 (Latham CJ), 291 (Rich J), 296 (Starke J), 300-301 and 304-305 (Dixon J), 322-324 (Evatt J), 327 (McTiernan J); *Commonwealth v New South Wales* (1923) 33 CLR 1 at 38 (Isaacs J). Notably, Commonwealth legislation can *only* limit, abrogate or displace a prerogative to the extent of the *Constitution*'s legislative powers, meaning that the Crown's prerogatives outside the Parliament's legislating powers cannot be limited.

118 See *Davis v Commonwealth* (1988) 166 CLR 79 at 108 (Brennan J); *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 319-322 (Evatt J).

119 See *Barton v Commonwealth* (1974) 131 CLR 477 at 491 (McTiernan and Menzies JJ), 498 (Mason J); *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 461 (Starke J).

under the *Companies Act 1899* (NSW) and both relying on the prerogative right of the King to preferential payment.[120] Justice Evatt considered that:

> … the royal prerogatives are so disparate in character and subject matter that it is difficult to assign them to fixed categories or subjects and thereby to determine whether they are exercisable by the Commonwealth Executive or that of the State or by both or by neither.[121]

Justice Evatt then proceeded to suggest a number of categories:

(a) The royal prerogatives whereby the Queen or her representative can act, such as to declare war, to make peace, and so on.[122] Justice Evatt referred to these as the 'executive prerogatives'.[123]

(b) The common law prerogatives that entitle the Crown to certain preferences, immunities and exceptions not available to subjects, such as the right to be paid ahead of other creditors, immunity from the processes of the courts, and so on.[124]

(c) The royal prerogatives constituting the proprietary rights of the Queen, such as the right to escheats, to royal metals, to treasure, Crown lands, and so on.[125]

Justice Evatt's resolution of contesting Commonwealth and State prerogatives was to apply two generalised rules:

(a) Unless there is valid Commonwealth legislation 'cutting down or destroying the prerogative rights of the State', then the prerogative remains intact for both the Commonwealth and the State.[126]

(b) If there is valid Commonwealth legislation 'cutting down or destroying the prerogative rights of the State', then the State's prerogative is diminished to give effect to the Commonwealth legislation.[127]

Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority (1997) 190 CLR 410

More recently, this was examined further in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* where the Defence Housing Authority (now Defence Housing Australia), a body corporate established by the *Defence Housing Authority Act 1987* (Cth) (now *Defence Housing Australia Act 1987* (Cth)), entered into a lease with the owner of the premises and then subleased the premises as residential accommodation for personnel of the defence force and the Department of Defence.[128] The lease was subject to the *Residential Tenancies Act 1987* (NSW) that allowed the owner to apply to the Residential Tenancies Tribunal for an order authorising entry into the premises.[129] The Defence

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120 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 319 (Evatt J).
121 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 320 (Evatt J). See also Herbert Evatt, *The King and His Dominion Governors: A study of the Reserve Powers of the Crown in Great Britain and the Dominions* (2nd ed, 1967) p 12.
122 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 320-321 (Evatt J).
123 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 321 (Evatt J).
124 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 321 (Evatt J).
125 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 321 (Evatt J). See also *New South Wales v Commonwealth* (1975) 135 CLR 337 at 441 (Stephen J).
126 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 323 (Evatt J).
127 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 323-324 (Evatt J).
128 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 428-429 (Dawson, Toohey and Gaudron JJ), 449 (McHugh J), 461 (Gummow J), 476 (Kirby J).
129 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 428 (Dawson, Toohey and Gaudron JJ), 449 (McHugh J), 462 (Gummow J), 477 (Kirby J).

Housing Authority sought an order preventing the hearing by the Residential Tenancies Tribunal for an order authorising entry into the premises.[130] The Defence Housing Authority asserted, in part, that it was immune to the application of the *Residential Tenancies Act 1987* (NSW) because of an implied constitutional immunity from State legislation.[131] In effect, the Defence Housing Authority was challenging the authority of the Residential Tenancies Tribunal as an emanation of the New South Wales executive to have legal consequences for the Commonwealth Executive.[132] That is, whether the State tribunal could make an order affecting the Commonwealth Executive. The majority of Chief Justice Brennan and Justices Dawson, Toohey and Gaudron concluded that the *Residential Tenancies Act 1987* (NSW) could not validly restrict or modify the capacities of the Commonwealth Executive, although such a law might validly regulate the Executive carrying out those activities.[133] Justices McHugh and Gummow concluded that the matter was about the *Constitution* s 109 and that there was no inconsistency that prevented the Commonwealth and State laws both applying.[134] Justice Kirby concluded that '[a] State Parliament could not legislate in a way that would impair the integrity or autonomy of the Government of the Commonwealth'.[135] The outcome was to find the Defence Housing Authority could not prevent the Residential Tenancies Tribunal hearing for an order authorising entry into the premises.[136] The judgments show that there remains some uncertainty about how extensively the Commonwealth Executive's prerogatives apply.

Chief Justice Brennan reasoned that there was 'a distinction between the capacities and functions of the Crown in right of the Commonwealth and the transactions in which that Crown may choose to engage in exercise of its capacities and functions'.[137] The phrase 'capacities and functions' meaning 'the rights, powers, privileges and immunities which are collectively described as the "executive power of the Commonwealth" in s 61 of the *Constitution*'.[138] For Chief Justice Brennan the imposition of a State law on the Commonwealth was to be characterised and resolved as:

> A State law which purports on its face to impose a burden on the Crown in right of the Commonwealth fails for one of two reasons. If the burden falls on the enjoyment of the Commonwealth prerogative, the law would be offensive to s 61 of the *Constitution*; if it falls on the enjoyment of a statutory power, it would be inconsistent with the Commonwealth law conferring the power and would be invalid by reason of s 109.[139]

Chief Justice Brennan then sought to explain his proposition that some State laws limiting the 'enjoyment of the Commonwealth prerogative' could be valid.[140] He suggested that where a State law seeks to limit or restrict a prerogative, the appropriate approach was that:

> … the focus of attention is on the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – as well as to its terms in order to ensure that the limitation or restriction is not flouted by mere drafting devices. For that reason, this Court looks to the practical operation (or substance) as well as the legal operation (or form) of an impugned law when an attack on validity is based on a constitutional privative power (footnote omitted).[141]

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130 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 428-429 (Dawson, Toohey and Gaudron JJ), 449 (McHugh J), 462 (Gummow J), 477 (Kirby J).
131 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 429 (Dawson, Toohey and Gaudron JJ), 449 (McHugh J), 462 (Gummow J), 478 (Kirby J).
132 See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 452 (McHugh J).
133 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 428 (Brennan CJ), 447 (Dawson, Toohey and Gaudron JJ).
134 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 460 (McHugh J), 469-470 (Gummow J).
135 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 507-508 (Kirby J).
136 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 428 (Brennan CJ), 447 (Dawson, Toohey and Gaudron JJ), 459 (McHugh J), 469-470 (Gummow J), 508-509 (Kirby J).
137 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424 (Brennan CJ).
138 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424 (Brennan CJ).
139 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 426-427 (Brennan CJ).
140 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 426-427 (Brennan CJ).
141 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427 (Brennan CJ).

Following such an analysis, he considered that 'there is no reason why the Crown in right of the Commonwealth should not be bound by a State law of general application which governs transactions into which the Crown in right of the Commonwealth may choose to enter'.[142] Thus, the 'executive power of the Commonwealth, exercised by its choice to enter the transaction, is not affected merely because the incidents of the transaction are prescribed by a State law'.[143] Chief Justice Brennan stated that this was consistent with his understanding of the views on Chief Justice Dixon in *Commonwealth v Cigamatic Pty Ltd (in liq)*.[144] In this matter then, Chief Justice Brennan assumed that the Defence Housing Authority was the Crown in right of the Commonwealth, or represented it, and that the impugned *Residential Tenancies Act 1987* (NSW) validly applied, and was not invalidated as 'offensive to s 61 of the *Constitution*'.[145] Put simply, the *Residential Tenancies Act 1987* (NSW) could apply to the Defence Housing Authority as the Crown in right of the Commonwealth because its substance and form was a law of general application that did not modify the Commonwealth prerogative specifically allocated to the Commonwealth by the *Constitution* (the capacity and function) .[146]

For Justices Dawson, Toohey and Gaudron a similar distinction and conclusion applied:

> It is necessary at the outset to observe a distinction between the capacities of the Crown on the one hand, by which we mean its rights, powers, privileges and immunities, and the exercise of those capacities on the other. In referring to the capacities of the Crown so defined, we are speaking of the same thing of which Dixon J spoke when he used the words 'capacity or functions' in *West v Commissioner of Taxation (NSW)* in quoting from the dissenting judgment of Isaacs J in *Pirrie v McFarlane*. Elsewhere he used other expressions to convey essentially the same meaning, such as the 'governmental rights and powers belonging to the Federal executive as such' or 'the rights or privileges, duties or disabilities, of the Commonwealth in relation to the subjects of the Crown'. In [*Commonwealth v Cigamatic Pty Ltd (in liq)*], Dixon CJ also spoke of the 'legal rights of the Commonwealth in relation to its subjects' … The purpose in drawing a distinction between the capacities of the Crown and the exercise of them is to draw a further distinction between legislation which purports to modify the nature of the executive power vested in the Crown – its capacities – and legislation which assumes those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities (footnotes omitted).[147]

Justices Dawson, Toohey and Gaudron then clarified the effect of State legislation attempting to limit the Commonwealth Executive:

> The States, on the other hand, do not have specific legislative powers which might be construed as authorising them to restrict or modify the executive capacities of the Commonwealth. The legislative power of the States is an undefined residue which, containing no such authorisation, cannot be construed as extending to the executive capacities of the Commonwealth. No implication limiting an otherwise given power is needed; the character of the Commonwealth as a body politic, armed with executive capacities by the *Constitution*, by its very nature places those capacities outside the legislative power of another body politic, namely a State, without specific powers in that respect. Having regard to the fundamental principle recognised in *Melbourne Corporation v Commonwealth*, only an express provision in the *Constitution* could authorise a State to affect the capacities of the Commonwealth executive and there is no such authorisation.[148]

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[142] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427 (Brennan CJ).
[143] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427 (Brennan CJ).
[144] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427 (Brennan CJ) citing *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 377-378 (Dixon CJ).
[145] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 428 (Brennan CJ).
[146] In *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 377-378 (Dixon CJ) cited by Chief Justice Brennan the example is a valid general State law affecting the sale of goods as opposed to an invalid State law purporting to affect 'a fiscal right belonging to the Commonwealth and affecting the its Treasury': *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 425 (Brennan CJ).
[147] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 438-439 (Dawson, Toohey and Gaudron JJ).
[148] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 440 (Dawson, Toohey and Gaudron JJ).

The result was to find that the Defence Housing Authority as a creature of the *Defence Housing Authority Act 1987* (Cth) was 'predicated upon the existence of a legal system' prescribed by the *Residential Tenancies Act 1987* (NSW) because the latter 'does nothing to alter or deny the functions of the [Defence Housing Authority]'.[149] The consequence was that the Commonwealth Executive was bound to comply with the State *Residential Tenancies Act 1987* (NSW).[150]

Justices McHugh and Gummow reached a similar conclusion albeit adopting different (and contrary) reasoning.[151] Justice McHugh found that 'the distinction between a capacity of the Commonwealth and its exercise is not easily drawn',[152] and that the *Defence Housing Authority Act 1987* (Cth) completely displaced any place for prerogatives of the Crown in right of the Commonwealth.[153] Thus, Justice McHugh commented, in respect of legislation:

> If the Parliament of the Commonwealth authorises the Executive Government to carry out an activity, its legislation, in the absence of an indication to the contrary, will be read as indicating that the Executive is to be bound by the common law rules and statutes applying in the States … Similarly, federal legislation will be construed as indicating that Commonwealth executive activity is to be carried out in accordance with the existing statute law of the State unless the legislation indicates to the contrary. In such cases, State law may apply to the Commonwealth even when it takes the form of imposing affirmative duties on the Commonwealth government.[154]

In these circumstances any conflict between the State law and the Commonwealth were to be resolved according to the inconsistency standard in the *Constitution* s 109.[155] The exception was where the State law sought 'to alter rights acquired by the Commonwealth as the result of executive activity' or 'to fetter an executive capacity or power of the Commonwealth', where the source of authority, capacity or power was the *Constitution* s 61 (and not Commonwealth legislation).[156] These exceptional cases were to be resolved according to 'the fundamental constitutional principle in [*Commonwealth v Cigamatic Pty Ltd (in liq)*]':[157]

> Just as the States cannot alter the common law right of the Commonwealth to priority in the payment of debts, so they cannot alter the existing contractual or proprietary rights and obligations of the Commonwealth in relation to its subjects that arise from the exercise of the executive power conferred by s 61 of the *Constitution*. It would be absurd to suppose that Dixon CJ [in *Commonwealth v Cigamatic Pty Ltd (in liq)*], while denying the States could alter the Commonwealth's common law priority in payment of the debt, accept that the States could alter the common law rights of the Commonwealth that gave rise to the debt.[158]

Justice McHugh accepted, however, that some general State laws might bind the Commonwealth in right of the Crown.[159] Where the demarcation arises so that the Commonwealth authorisation of executive activity is outside the bounds of State laws was, according to Justice McHugh, addressed by asking:

> In determining whether the Commonwealth Crown has power to authorise its servants or agents to disobey a State law, the first question is, is the State law binding on the Commonwealth Crown?[160]

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[149] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 447 (Dawson, Toohey and Gaudron JJ).
[150] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 447 (Dawson, Toohey and Gaudron JJ).
[151] See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 460 (McHugh J), 469-470 (Gummow J).
[152] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 455 (McHugh J).
[153] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 459 (McHugh J).
[154] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 452-453 (McHugh J).
[155] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 453 (McHugh J).
[156] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 453 (McHugh J).
[157] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 453 (McHugh J).
[158] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 354 (McHugh J).
[159] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 356-357 (McHugh J).
[160] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 457 (McHugh J).

Justice McHugh's answer was that laws that 'discriminate against the exercise of an executive activity' relying on the *Constitution* s 61 power would not bind the Commonwealth Crown,[161] while 'a general law that merely regulates the manner or mode of performing an activity' would be 'unlikely to constitute an infringement'.[162]

> Such laws are to be contrasted with State laws that purport to bind the Commonwealth itself in exercising the capacities and power conferred by s 61 of the Constitution alone or in conjunction with other powers of the Commonwealth. State laws purporting to have that effect can only operate as interpretation clauses. They show that the State law is intended to apply to the Commonwealth. However, they can do so only to the extent that the Commonwealth submits to the law by express words or conduct or by inference from its silence. But that is all.[163]

Importantly, Justice McHugh considered that this proposition *only* applied to 'those aspects of Commonwealth executive power which find their source in the provisions of the *Constitution* as opposed to those aspects of executive power that are sourced in the statutory powers of the Commonwealth'.[164] Following Justice McHugh's reasoning, however, was that 'State laws that purport to bind the Commonwealth itself in exercising the capacities and powers' only apply 'to the extent that the Commonwealth submits to the law by express words or conduct or by inference from its silence'.[165] As the Defence Housing Authority was 'the immediate product' of the *Defence Housing Authority Act 1987* (Cth) there was no place for the exceptional *Commonwealth v Cigamatic Pty Ltd (in liq)* doctrine,[166] then the matter was simply resolved as an analysis of inconsistency between Commonwealth and State laws according to the *Constitution* s 109.[167]

Justice Gummow, like Justice McHugh, considered the Defence Housing Authority a creature of the *Defence Housing Authority Act 1987* (Cth) that was outside the scope of the exceptional *Commonwealth v Cigamatic Pty Ltd (in liq)* doctrine, and that it was bound by State laws unless they were inconsistent according to the *Constitution* s 109.[168] To avoid State laws the Commonwealth legislation needed to expressly exclude the statutory entity.[169] As the Defence Housing Authority was not expressly excluded then it was bound by the State *Residential Tenancies Act 1987* (NSW) to the extent of any inconsistency in a 'constitutional sense'.[170] On the content of the exceptional *Commonwealth v Cigamatic Pty Ltd (in liq)* doctrine, Justice Gummow, like Justice McHugh,[171] did not find 'illuminating' distinctions about the capacities of the Commonwealth and the exercise of those capacities,[172] and stated:

> The [*Commonwealth v Cigamatic Pty Ltd (in liq)*] doctrine accepts that (i) the common law may be qualified or replaced by State legislation with a general operation in respect of certain kinds of transactions or business activity, and (ii) such State legislation may have an impact upon the activities of the Executive Government of the Commonwealth

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[161] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 457-458 (McHugh J) citing as justification the reasons set out in *West v Commissioner of Taxation* (1937) 56 CLR 657 at 681-682 (Dixon J).
[162] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 458 (McHugh J).
[163] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 458 (McHugh J).
[164] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 458 (McHugh J). Notably the 'Commonwealth executive power which find their source in the provisions of the *Constitution*' applies more broadly than the common law prerogatives of the Crown. Further, prerogatives reduced to legislation will be excluded, relying on the *Attorney-General v De Keyser's Hotel* [1920] AC 508 that 'when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative but must act in accordance with the statutory regime laid down by the Parliament' (at 459 (McHugh J)).
[165] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 458 (McHugh J).
[166] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 459 (McHugh J).
[167] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 459-460 (McHugh J).
[168] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 459-460 (McHugh J).
[169] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 469 (Gummow J) citing the example of *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 (Dixon CJ, McTiernan, Kitto, Taylor, Windeyer and Owen JJ) illustrating that 'the Parliament may establish a corporation and provide that it not be subject to taxation under the law of a State such as stamp duty legislation'.
[170] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 469 (Gummow J).
[171] See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 455 (McHugh J).
[172] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 472 (Gummow J).

> consistently with the principle that the execution and maintenance of Commonwealth law is the exclusive domain of the Commonwealth.[173]

He then added:

> In [*Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)*], Dixon J distinguished between this general body of law as it affected dealings by the Executive Government of the Commonwealth in the course of the orderly administration of governments and State laws which would detract from or adversely affect the very governmental rights of the Commonwealth, in the exercise of which it might engage in such transactions.[174]

The differences between the judgments in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* was essentially about the characterisation of the Commonwealth Executive's immunity (according to the exceptional *Commonwealth v Cigamatic Pty Ltd (in liq)* doctrine), either as legislation co-existing with the prerogatives or with legislation ousting the prerogatives.[175] Chief Justice Brennan and Justices Dawson, Toohey and Gaudron considered the Commonwealth Executive could be bound by State laws of general application (exercising its 'capacities'). Meanwhile Justices McHugh and Gummow rejected this approach and preferred a broader immunity for the Commonwealth executive power where it does not rely on a Commonwealth statutory source. The approaches remain contested,[176] but for present purposes, they illustrate that there remains some uncertainty about how extensively the Commonwealth Executive's prerogatives apply in over-riding State laws. In the alternative, the question is the extent to which the Commonwealth Executive's prerogatives need to comply with conflicting State laws?

Barton v Commonwealth (1974) 131 CLR 477

Secondly, where identified prerogatives may have been codified, modified or displaced by legislation. Some guidance to this problem has been provided by the High Court. In *Barton v Commonwealth* an Australian citizen was charged with offences in New South Wales but was presently outside Australia and in Brazil.[177] The *Extradition (Foreign States) Act 1966* (Cth) set out extraditable offences that included the citizen's alleged offence and provided for the Attorney-General to requisition surrender from a foreign state with which there was a concluded extradition treaty or that the *Extradition Act 1870* (Imp) applied.[178] Australia and Brazil did not have an extradition treaty in place and the *Extradition Act 1870* (Imp) did not apply.[179] The Australian Government had requested through diplomatic channels the citizen's detention in Brazil in preparation for his extradition to Australia.[180] The plaintiff sought a declaration that the Australian Government's request was outside the scope of executive power and invalid.[181] While an applicable prerogative power for the Australian Government to make the request through diplomatic channels existed,[182] the issue was

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[173] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 473 (Gummow J) citing *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 440 (Isaacs J).

[174] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 473 (Gummow J) referring to *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 at 308 (Dixon J).

[175] See also William Gummow, 'The Nature and Operation of Prerogative Powers in the Federal System. The Commonwealth of Australia v Cigamatic Pty Ltd' (1964) 4 *Sydney Law Review* 435 at 448.

[176] See, for example, *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51 at 78-79 (Gummow J).

[177] *Barton v Commonwealth* (1974) 131 CLR 477 at 481 (Barwick CJ), 491-492 (Mason J), 504 (Jacobs J).

[178] *Barton v Commonwealth* (1974) 131 CLR 477 at 481 (Barwick CJ), 489 (McTiernan and Menzies JJ), 492 (Mason J), 506-508 (Jacobs J).

[179] *Barton v Commonwealth* (1974) 131 CLR 477 at 481 and 486-487 (Barwick CJ), 492 and 484 (Mason J), 506-507 (Jacobs J).

[180] *Barton v Commonwealth* (1974) 131 CLR 477 at 481-482 (Barwick CJ), 489 (McTiernan and Menzies JJ), 492 (Mason J), 504 (Jacobs J).

[181] *Barton v Commonwealth* (1974) 131 CLR 477 at 482 (Barwick CJ), 489 (McTiernan and Menzies JJ), 491 (Mason J), 504 (Jacobs J).

[182] See *Barton v Commonwealth* (1974) 131 CLR 477 at 485 (Barwick CJ), 490-491 (McTiernan and Menzies JJ), 494-495 and 498-499 (Mason J), 505-506 (Jacobs J).

whether that prerogative was displaced by legislation through the *Extradition (Foreign States) Act 1966* (Cth).[183] The plaintiffs' argument was that the *Extradition (Foreign States) Act 1966* (Cth) provided an 'exclusive and comprehensive code governing extradition to and from foreign states', and as a consequence, displacing any prerogatives.[184] The justices, however, concluded that legislation can displace a prerogative.[185] Chief Justice Barwick considered that to displace a prerogative there needed to be 'a clear and unambiguous provision'.[186] For Justices McTiernan and Menzies a prerogative remained 'unless statute, either expressly or by necessary implication, has deprived the executive of part of its inherent power'.[187] For Justice Mason it was 'well accepted that a statute will not be held to abrogate a prerogative of the Crown unless it does so by express words or by implication, that is, necessary implication'.[188] For Justice Jacobs 'an intention to withdraw or curtail a prerogative power must be clearly shown'.[189] The result was that the justices considered that there was a prerogative to request detention in contemplation of extradition and that it was not displaced by the *Extradition (Foreign States) Act 1966* (Cth).[190]

The utility of the decision in *Barton v Commonwealth* was to establish that prerogatives remain and may be codified, modified or displaced by legislation,[191] albeit *only* expressly or by necessary implication will the legislation oust the prerogative.[192] Again the various judgments demonstrate that the resolution of legislatively ousted prerogatives is not without some complexity. Subsequent High Court decisions have confirmed and applied these propositions providing some further illumination, although the degree to which the statute must expressly or by necessary implication oust the prerogative is itself open to speculation.

Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44

Thus in *Jarratt v Commissioner of Police (NSW)* a Deputy Commissioner was removed from office 'on the grounds of performance'.[193] The Deputy Commissioner was appointed under a contract of employment according to the *Police Service Act 1990* (NSW).[194] The *Police Service Act 1990* (NSW) provided that an officer may be removed from office by the Governor on the recommendation of the Commissioner and with the approval of the Minister.[195] The plaintiff Deputy Commissioner sought a declaration that his removal was invalid because he was not given an opportunity to be

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183 *Barton v Commonwealth* (1974) 131 CLR 477 at 486-487 (Barwick CJ), 490 (McTiernan and Menzies JJ), 499 (Mason J), 506-507 (Jacobs J).

184 *Barton v Commonwealth* (1974) 131 CLR 477 at 500 (Mason J). See also 486 (Barwick CJ), 507 (Jacobs J).

185 *Barton v Commonwealth* (1974) 131 CLR 477 at 488 (Barwick CJ), 491 (McTiernan and Menzies JJ), 500-501 (Mason J), 507-508 (Jacobs J).

186 *Barton v Commonwealth* (1974) 131 CLR 477 at 488 (Barwick CJ).

187 *Barton v Commonwealth* (1974) 131 CLR 477 at 491 (McTiernan and Menzies JJ).

188 *Barton v Commonwealth* (1974) 131 CLR 477 at 501 (Mason J) citing *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 576. Justice Mason also considered that '[i]t is not to be supposed that Parliament intended to abrogate the power [to request detention in contemplation of extradition] in the absence of a clearly expressed intention to that effect' (p 501).

189 *Barton v Commonwealth* (1974) 131 CLR 477 at 508 (Jacobs J).

190 *Barton v Commonwealth* (1974) 131 CLR 477 at 488-489 (Barwick CJ), 491 (McTiernan and Menzies JJ), 504 (Mason J), 508 (Jacobs J).

191 For an illustration of the alternative circumstances where there was an extradition treaty in place and reaching a similar conclusion see *Oates v Attorney-General* (2003) 214 CLR 496 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ).

192 But perhaps *Barton v Commonwealth* might now be rationalised as a case relying on a 'national government' like authority: see *Barton v Commonwealth* (1974) 131 CLR 477 at 483 (Barwick CJ) ('a most important aspect of international life'), 501 (Mason J) ('an important power essential to the proper vindication and an effective enforcement of Australian municipal law').

193 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 48 (Gleeson CJ), 58 and 61-62 (McHugh, Gummow and Hayne JJ), 73 (Callinan J).

194 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 48 (Gleeson CJ), 59 (McHugh, Gummow and Hayne JJ), 71-73 (Callinan J).

195 See *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 53-54 and 55 (Gleeson CJ), 60-61 (McHugh, Gummow and Hayne JJ), 73-76 (Callinan J).

heard on the substance of any criticism of his 'performance'.[196] The defendant contended that the Deputy Commissioner's appointment and removal was the subject of a prerogative and this did not require procedural fairness.[197] The issue was essentially whether the provisions of the *Police Service Act 1990* (NSW) modified the prerogative to remove police officers without reason or justification by including the requirements of natural justice (procedural fairness).[198]

Chief Justice Gleeson considered that the *Police Service Act 1990* (NSW) co-existed with the existing prerogative imposing a process for removal,[199] and that inherent in a process imposed by legislation was a requirement for procedural fairness.[200] As a consequence the Deputy Commissioner was entitled to procedural fairness in the Governor exercising the power of removal under the *Police Service Act 1990* (NSW).[201] Meanwhile Justices McHugh, Gummow and Hayne considered that the powers of appointment and removal were expressly addressed by the *Police Service Act 1990* (NSW) and that this *did* replace any prerogative:[202] '[b]y necessary implication, the prerogative found in [the *Constitution*],[203] and which might have been employed to create the applicant's position as Deputy Commissioner as one at pleasure, was abrogated or displaced by the Act itself'.[204] The result was that the Deputy Commissioner's removal from office was a statutory matter under the *Police Service Act 1990* (NSW), and the implication of procedural fairness was not displaced from the *Police Service Act 1990* (NSW).[205] Similarly, Justice Callinan considered that the provisions of the *Police Service Act 1990* (NSW) 'manifest an intention to displaced or replace' any prerogative so that matter was to be resolved under the *Police Service Act 1990* (NSW).[206] Justice Heydon addressed the issues simply as a question of whether the *Police Service Act 1990* (NSW) as applied required procedural fairness.[207] He concluded that 'the construction of the legislation is clear: it does not exclude procedural fairness' and that the prerogative arguments were of 'no determinative significance'.[208] Thus, *Jarratt v Commissioner of Police (NSW)* essentially illustrates the general proposition that an identified prerogative can be ousted by legislation, but determining when and to what extent the prerogative is ousted is uncertain.

5.4.3 Authority from what the Constitution *says*

The extent of constitutional sources of executive power not involving the prerogatives undoubtedly extends to the various sections of the *Constitution* vesting the Governor-General (and the Governor-

196 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 48 (Gleeson CJ), 61 (McHugh, Gummow and Hayne JJ), 78 (Callinan J).
197 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 48 (Gleeson CJ), 64 (McHugh, Gummow and Hayne JJ), 78 (Callinan J).
198 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 52 (Gleeson CJ), 64 and 67-68 (McHugh, Gummow and Hayne JJ), 71 (Callinan J), 95 (Heydon J).
199 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 55 (Gleeson CJ). Significantly, Chief Justice Gleeson said: '[t]hat this provision [s 51, that an officer may be removed from office by the Governor on the recommendation of the Commissioner and with the approval of the Minister] reflects, and gives partial effect to, the common law principle discussed above is not in doubt'.
200 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 56-57 (Gleeson CJ).
201 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 57 (Gleeson CJ).
202 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 68 (McHugh, Gummow and Hayne JJ).
203 The *Constitution Act 1902* (NSW) s 47 provides, in part: '… the appointment of all public offices under the Government … shall be vested in the Governor with the advice of the Executive Council'.
204 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 70 (McHugh, Gummow and Hayne JJ) citing *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 459 (McHugh J) that in turn was citing the principle laid down in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 526 (Lord Dunedin), 537-540 (Lord Atkinson), 549-550 (Lord Moulton), 561-562 (Lord Sumner), 575-576 (Lord Parmoor) and *Brown v West* (1990) 169 CLR 195 at 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
205 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 70 (McHugh, Gummow and Hayne JJ).
206 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 87-88 (Callinan J).
207 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 95 (Heydon J).
208 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 95 (Heydon J).

General in Council) with specific executive powers,[209] and the express powers of the Parliament enumerated in the *Constitution* s 51.[210] The extension beyond the s 51 heads remains contentious.[211] The High Court's interpretations remains critical to the expanding role of the Commonwealth into areas and subject matters not contemplated at the time of Federation and the possible boundaries of executive power. Conversely, however, the *Constitution* also sets some limits so that the Executive cannot impede interstate trade, affect religion, discriminate against residents of a State, and so on.[212] The following surveys key High Court decisions tracing the expansion of executive powers from what the High Court says the *Constitution* says.

Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd (1922) 31 CLR 421

The early decisions of the High Court conceived the *Constitution* s 61 as a source of some authority for executive power. In *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* the Commonwealth had entered into various agreements with Colonial Combing, Spinning and Weaving Co Ltd.[213] At the time of agreements, and during the performance of the agreements, the *War Precautions Act 1914* (Cth), the *War Precautions (Wool) Regulations 1916* (Cth) and the *War Precautions (Sheepskins) Regulations 1916* (Cth) regulated the conditions under which sheepskins and wool could be purchased and sold in Australia.[214] These regulations required the company to seek Commonwealth approval for various dealings with wool.[215] The agreements then provided for the Commonwealth and the company to share various payments in the purchase and sale of wool.[216] In essence, the arrangement 'was to extort a certain part of the net earnings of the business of the company as a condition of [the Commonwealth's] consent to the doing of acts by the company which were essential to the carrying on of the latter's business'.[217] The agreements had been signed by the Prime Minister with the following citation: 'for and on behalf of and so as to bind the Government of the Commonwealth and not so as to incur any personal liability'.[218] The dispute concerned, in part, the ability of the Executive government to enter into agreements: was it 'within the legal power of the Commonwealth Executive Government *apart from any Act of the Parliament or regulation thereunder* to make or ratify … [the] … agreements?' (emphasis added).[219] In

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[209] These include the *Constitution* ss 5 (dissolving the House of Representatives), 21 (notifying of a vacancy in the Senate), 32 (issuing writs for an election for the House of Representatives), 33 (issuing writs for a vacancy in the House of Representatives),56 (recommending money votes), 57 (resolving disagreement between the Houses), 61 (vested executive power), 62 (summon Federal Executive Council), 64 (appointment of Ministers), 65 (Ministers holding office), 68 (command of the naval and military forces), 69 (proclaiming transferred Departments), 70 (former powers and functions of Governors of Colonies), 72 (appoint High Court judges), 83 (drawing money from the Treasury) and 126 (appoint deputies).

[210] See, for example, *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 432-433 (Know CJ and Gavan Duffy J), 433 (Isaacs J), 461 (Starke J).

[211] That the *Constitution* s 61 vests Executive power in the Queen and enables its exercise by the Governor-General does not appear to be contentious: see, for example, *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431 (Know CJ and Gavan Duffy J).

[212] See *Constitution* ss 92 (interstate trade), 116 (religion) and 117 (non-discrimination against residents of a State).

[213] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 434-436 (Isaacs J).

[214] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 423 and 457-458 (Starke J).

[215] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 423-429 and 458 (Starke J).

[216] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 423-429 and 458-459 (Starke J).

[217] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 459 (Starke J).

[218] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 422-423.

[219] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 430 and 457 (Starke J). If the answer was yes, then a subsidiary question would have followed: 'was the approval of the Governor-General in Council necessary to the making or ratification thereof?' (at 430 and 457 (Starke J)). It was not, however, necessary to address that question.

other words: 'the King – the Executive Government of the King in the Commonwealth – can, without parliamentary sanction, exact the payment of the moneys mentioned in these agreements, as a condition of or as consideration for giving consent to acts necessary to the conduct of the subject's business?'[220] The High Court concluded that without the authority of an Act of Parliament or its regulations, the Executive had no power to make or ratify any of the agreements.[221] In reaching this conclusion each of the decisions addressed the meaning of the *Constitution* s 61.[222]

Chief Justice Knox and Justice Gavin Duffy considered that the *Constitution* s 61 defined the scope of executive power:

> The section has three distinct functions: it vests the executive power of the Commonwealth in the Sovereign, it enables that power to be exercised by the Governor-General as the Sovereign's representative, and it delimits the area of that power by declaring that it extends to the execution and maintenance of the *Constitution* and of the laws of the Commonwealth … an act not authorized by s 61 is not within the legal power of the Commonwealth Executive Government, and, even if done by the Sovereign or by the Governor-General, must invoke some authority other than the *Constitution*.[223]

In their opinion, the agreements between the Commonwealth and Colonial Combing, Spinning and Weaving Co Ltd were 'not mediately or immediately authorized by any Act of the Parliament' and so outside the authority of s 61 'the laws of the Commonwealth'.[224] They then turned to consider whether the agreements might be considered as made in 'the execution and maintenance of the *Constitution*' and concluded:[225]

> It is clear that none of these agreements is made in maintenance of the *Constitution*, and in our opinion it is equally clear that none is made in the execution of the *Constitution*, because none of them is prescribed or even authorized by the *Constitution* itself, and execution of the *Constitution* means the doing of something immediately prescribed or authorized by the *Constitution* without the intervention of Federal legislation.[226]

Importantly though, Chief Justice Knox and Justice Gavin Duffy considered that if the agreements had been signed as part of the administration of the Commonwealth, as contemplated in the *Constitution* s 64, then they might have been authorised as 'might from time to time be necessary in the course of such administration'.[227]

Adopting a similarly narrow perspective, Justice Higgins also considered the executive power derived from the s 61 phrase 'extends to the execution and maintenance of this *Constitution*',[228] presumably concluding that the phrase 'and of the laws of the Commonwealth' was of no relevance

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[220] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 459-460 (Starke J).

[221] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 433 (Knox CJ and Gavan Duffy J), 443 (Isaacs J), 454 (Higgins J), 461 (Starke J). Notably Justice Powers did not deliver a judgment.

[222] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431-432 (Knox CJ and Gavan Duffy J), 437-443 (Isaacs J), 453-454 (Higgins J), 461 (Starke J).

[223] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431-432 (Knox CJ and Gavan Duffy J).

[224] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 432 (Knox CJ and Gavan Duffy J).

[225] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 432 (Knox CJ and Gavan Duffy J). Perhaps significantly the justices frame this as 'whether any of [the agreements] can properly be described as made in the execution *or* maintenance of the *Constitution* itself' (emphasis added).

[226] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 432 (Knox CJ and Gavan Duffy J).

[227] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 432 (Knox CJ and Gavan Duffy J).

[228] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 453-454 (Higgins J).

in the way the issue for determination had been framed.[229] Justice Higgins was unable to find a relevant Crown prerogative that might justify entering the agreements, and further, that that prerogative had been given to the Governor-General.[230] The result was that tracing the powers and functions assigned to the Governor-General under the *Constitution* ss 2 and 61 did not disclose an authority to enter into agreements, and without that express authority (or a suitable law of the Commonwealth) then there was no basis for a prerogative to enter contracts.[231]

In contrast, Justice Isaacs considered the executive power conferred by the phrase 'extends to the execution and maintenance of this *Constitution*' was such that it 'marks the external boundaries of the Commonwealth executive power, so far as that is conferred by the *Constitution*, but it leaves entirely untouched the definition of that power and its ascertainment in any given instance'.[232] In determining the proper construction of the *Constitution*'s boundaries, Justice Isaacs distinguished between the lawfulness of the particular agreements and the domain of executive action:

> s 61, when carefully examined, simply applies to the new constitutional structure, the Commonwealth, but with the necessary adaptation, the basic principle of the law of the Empire that the King is indistinguishably the King of the whole Empire, but that the springs of royal action differ with locality. Where responsible government exists, it is an axiom of the public life of the British Commonwealth of Nations that the King's agents to regulate the exercise of his royal authority with respect to each Dominion are those chosen by the people of that Dominion. In the development of the Federal system in the Dominions, the doctrine adapts itself to the differentiation of ministerial agents for different purposes in the same locality.[233]

Unable to identify a source of Imperial legislation, Justice Isaacs turned to finding an authority arising out of the *Constitution*,[234] but was unable to find that authority, either expressly or by implication, considering intra-state and foreign trade and the Crown war prerogative.[235] The result was that the agreements were not authorised by the executive power conferred by the phrase 'extends to the execution and maintenance of this *Constitution*'.[236] But Justice Isaacs did consider, however, that '[t]he mere fact of the creation of the Executive Government carries with it some constitutional consequences, unwritten, it is true … included in the terms "maintenance of the *Constitution*"'.[237] In responding to an argument that the agreements were made during a state of war so that the Executive had the power of the Crown prerogative to do what was necessary, including make agreements,[238] Justice Isaacs said:

> … it forms a striking example of the insufficiency of the mere words of s 61, or the mere words of other sections of the *Constitution*, taken by themselves and apart from the circumstances of the moment to form an invariable measuring-rod of Commonwealth executive power. It is unquestionable law that 'those who are responsible for the

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[229] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 454 (Higgins J).
[230] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 454-455 (Higgins J).
[231] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 453-454 (Higgins J).
[232] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437 (Isaacs J).
[233] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 438 (Isaacs J).
[234] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 441 (Isaacs J).
[235] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 441-443 (Isaacs J).
[236] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 451 (Isaacs J).
[237] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 441 (Isaacs J).
[238] See *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 441-442 (Isaacs J).

> national security must be the sole judges of what the national security requires'.[239] It is equally undoubted law that in presence of national danger in time of war the prerogative attracts, by force of the circumstances that exist, authority to do acts not otherwise justifiable.[240]

Justice Isaacs considered that the Crown prerogatives did not apply here as the Commonwealth had not established that entering the agreements was necessary for national security and that it had acted on that basis.[241] The significance of this analysis was to suggest that Justice Isaacs considered that, in some circumstances, there was the potential for 'the transgression of the limits of the constitutional domain of the Commonwealth executive power marked out by the third declaration in s 61 … ['execution and maintenance of the *Constitution*'].[242]

Like Justice Isaacs, Justice Starke contemplated a broader role for the *Constitution* s 61 that included the prerogatives saying that the s 61 powers:

> … simply marks out the field of the executive power of the Commonwealth, and the validity of any particular act within that field must be determined by reference to the *Constitution* or the laws of the Commonwealth, or to the prerogative or inherent powers of the King.[243]

Burns v Ransley (1949) 79 CLR 101

The High Court again considered the executive powers in s 61 in *Burns v Ransley* where a member of the Australian Communist Party was convicted under the *Crimes Act 1914* (Cth) for uttering seditious words.[244] One of the appellant's contentions was that the Parliament had no general power to make laws with respect to crime, and specifically, to make political criticism an offence.[245] On this question Justices Rich and McTiernan accepted that the provisions of the *Crimes Act 1914* (Cth) were valid without expressly stating their reasons.[246] Chief Justice Latham and Justice Dixon both considered there was adequate power to make the laws[247] relying on the incidental powers coupled with the executive power in the *Constitution* ss 51(xxxix) and 61.[248] Chief Justice Latham stated:

> Under this provision the Commonwealth Parliament may make laws to protect and maintain the existing Government and the existing departments and officers of the Government in the execution of their powers[249] … The Commonwealth Parliament, which is the legislative organ of the Commonwealth, has power to make laws to protect them and itself, not only against physical attack and interference, but also against utterance of words intended to excite disaffection against the Government (in the sense stated) and to prevent or impede the operation of governmental agencies which prepare for defence and conduct warlike operations during war in accordance with the policy of the Government, which is responsible to the Parliament of the Commonwealth … In the provisions which have been attacked relating to disaffection Parliament has provided protection for the Government and governmental activities. Protection against fifth column activities and subversive propaganda may reasonably be regarded as desirable or even necessary for the purpose of preserving the constitutional powers and operations of

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[239] Citing *The Zamora* (1916) 2 AC 77 at 107 (Lord Parker).
[240] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 442 (Isaacs J).
[241] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 442-443 (Isaacs J).
[242] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 443 (Isaacs J).
[243] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 461 (Starke J).
[244] *Burns v Ransley* (1949) 79 CLR 101 at 107-108 (Latham CJ), 111 (Rich J), 112-114 (Dixon J),
[245] *Burns v Ransley* (1949) 79 CLR 101 at 109 (Latham CJ), 111 (Rich J), 114 (Dixon J),
[246] *Burns v Ransley* (1949) 79 CLR 101 at 111 (Rich J), 120 (McTiernan J). Notably Justice McTiernan stated his reasons were set out in *R v Sharkey* (1949) 79 CLR 121.
[247] *Burns v Ransley* (1949) 79 CLR 101 at 110 (Latham CJ), 116 (Dixon J).
[248] *Burns v Ransley* (1949) 79 CLR 101 at 109-110 (Latham CJ), 116 (Dixon J). Notably Justice Dixon did not explicitly identify the *Constitution* s 61, although the inference that this was the intended power under consideration seems likely given the same *Crimes Act 1914* (Cth) provisions were also considered by Justice Dixon in *R v Sharkey* (1949) 79 CLR 121 at 148 saying 'because the likelihood or tendency of resistance or opposition to the execution of the functions of government is a matter that is incidental to the exercise of all its powers'.
[249] Citing *R v Kidman* (1915) 20 CLR 425 at 440 (Isaacs J).

> governmental agencies and the existence of government itself. The prevention and punishment of intentional excitement of disaffection against the Sovereign and the Government is a form of protective law for this purpose which is to be found as a normal element in most, if not all, organized societies. I agree that the Commonwealth Parliament has no power to pass a law to suppress or punish political criticism, but excitement to disaffection against a Government goes beyond political criticism.[250]

Along the same lines, Justices Dixon stated:

> But I do not suppose that it would be denied that the legislative power of the Commonwealth extends to measures for the suppression of incitements to the actual use of violence for the purpose of resisting the authority of the Commonwealth or effecting a revolutionary change in the form of government. In the same way I think that the legislative power authorizes measures against incitements to the use of violence for the purpose of effecting a change in our constitutional position under the Crown or in relation to the United Kingdom or in the Constitution or form of government in the United Kingdom. Our institutions may be changed by laws adopted peaceably by the appropriate legislative authority. It follows almost necessarily from their existence that to preserve them from violent subversion is a matter within the legislative power. But the power must extend much beyond inchoate or preparatory acts directed to the resistance of the authority of government or forcible political change. I am unable to see why it should not include the suppression of actual incitements to an antagonism to constitutional government, although the antagonism is not, and may never be, manifested by any overt acts of resistance or by any resort to violence.[251]

R v Sharkey (1949) 79 CLR 121

Burns v Ransley illustrated the evolving broad potential of the incidental powers coupled with the executive power in the *Constitution* ss 51(xxxix) and 61 to legitimise executive power. In *R v Sharkey* the same *Crimes Act 1914* (Cth) provisions that were addressed in *Burns v Ransley* were considered in the context of uttering seditious words with the same challenge that they were beyond the Parliament's general power to make laws with respect to crime, and specifically, to make political criticism an offence.[252] Chief Justice Latham and Justice Rich adopted their reasoning from *Burns v Ransley*,[253] and Chief Justice Latham concluded that the incidental powers coupled with the executive power in the *Constitution* ss 51(xxxix) and 61 were adequate to validate some of the *Crimes Act 1914* (Cth) provisions.[254] Justices Rich and Williams accepted there was adequate power but did not clearly identify its sources in addition to the incidental power in the *Constitution* s 51(xxxix).[255] Justice Webb considered that there might be an appropriate common law received in Australia, but then considered that the incidental power coupled with the external affairs power in the *Constitution* ss 51(xxxix) and (xxix) was sufficient.[256] Justice Dixon set out a more nuanced decision stating, in part:

> I do not doubt that the legislative power of the Commonwealth extends to making punishable any utterance or publication which arouses resistance to the law or excites insurrection against the Commonwealth Government or is reasonably likely to cause discontent with and opposition to the enforcement of Federal law or to the operations of Federal government. The power is not expressly given but it arises out of the very nature and existence of the Commonwealth as a political institution, because the likelihood or tendency of resistance or opposition to the execution of the functions of government is a matter that is incidental to the exercise of all its powers. But the legislative power is in my opinion still wider. The common law of seditious libel recognizes that the law cannot suffer publications the purpose of which is to arouse disaffection against the Crown, the Government or the established institutions of the country, although they stop short of counselling or inciting actual opposition, whether active or passive, to the exercise of the functions of government …The prevention of attempts to excite hostility where obedience is necessary for the effective working of government appears to be recognized as a proper purpose of the legislation of the Government concerned. I therefore regard it as clearly within power to penalize utterances

[250] *Burns v Ransley* (1949) 79 CLR 101 at 110 (Latham CJ).
[251] *Burns v Ransley* (1949) 79 CLR 101 at 116 (Dixon J).
[252] *R v Sharkey* (1949) 79 CLR 121 at 134 (Latham CJ), 146-147 (Dixon J), 161-162 (Webb J).
[253] *R v Sharkey* (1949) 79 CLR 121 at 135 (Latham CJ), 145 (Rich J).
[254] *R v Sharkey* (1949) 79 CLR 121 at 136 (Latham CJ).
[255] *R v Sharkey* (1949) 79 CLR 121 at 145 (Rich J), 159 (Williams J),
[256] *R v Sharkey* (1949) 79 CLR 121 at 163 (Webb J).

> and publications expressing a purpose of exciting disaffection against the Sovereign, the Government or *Constitution* of the Commonwealth or either House of the Parliament of the Commonwealth.[257]

Significantly, Justice Dixon also set out the limits of such a power, principally as a limit on the bounds of the incidental power in the *Constitution* s 51(xxxix):

> Unless in some way the functions of the Commonwealth are involved or some subject matter within the province of its legislative power or there is some prejudice to the security of the Federal organs of government to be feared, ill-will and hostility between different classes of His Majesty's subjects are not a matter with respect to which the Commonwealth may legislate. Such feelings or relations among people form a matter of internal order and fall within the province of the States.[258]

Victoria v Commonwealth and Hayden (1975) 134 CLR 338

Later in *Victoria v Commonwealth and Hayden* (*Australian Assistance Plan case*) (see also ¶7.6.1, p 218) where money was appropriated in the *Appropriation Act (No 1) 1974-1975* (Cth) for the Australian Assistance Plan comprising grants to Regional Councils for Social Development and some development and evaluation expenses.[259] The Plan was not the subject of legislation (albeit legislation was contemplated),[260] instead being detailed in writings of a Committee of the Social Welfare Commission prepared in response to a Minister's request 'for assistance in "the development of a new project"'.[261] The main issue was the validity of the particular appropriation within the requirements of the *Constitution* s 81 'appropriated for the purposes of the Commonwealth'.[262] A subsidiary question, and relevant to the scope of executive power, was raised in argument. The plaintiff's argument was that the purposes for which the money was appropriated needed to be found within the *Constitution* and that s 61 could not sustain the Plan because it 'has nothing to do with the execution and maintenance of the *Constitution*'.[263] The defendant asserted that 'the expression ["purposes of the Commonwealth" in s 81] comprises those purposes for which Parliament may make laws, whether under s 51, s 122 or any inherent powers, any executive purpose within s 61, and any matter or event which is an occasion of national concern'.[264] Of the various judgments, Justices Gibbs, Mason, Jacobs and Murphy specifically addressed the scope of s 61.[265]

Justice Gibbs concluded that the Plan was not for the 'purposes of the Commonwealth' as required by the *Constitution* s 81 and so the appropriation for the Plan was invalid.[266] As a consequence the expenditure of money for the Plan was also unlawful.[267] He then considered that the phrase in s 61 'extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth' made 'it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth'.[268] By way of explanation he then stated:

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[257] *R v Sharkey* (1949) 79 CLR 121 at 148-149 (Dixon J).
[258] *R v Sharkey* (1949) 79 CLR 121 at 150 (Dixon J).
[259] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 343 (Barwick CJ), 366-367 (McTiernan J), 370 (Gibbs J), 384 (Stephen J), 398-400 (Mason J), 402-404 (Jacobs J), 415-417 (Murphy J).
[260] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 352 (Barwick CJ), 377 (Gibbs J).
[261] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 346-347 (Barwick CJ), 377 (Gibbs J).
[262] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 343-344 (Barwick CJ), 366-367 (McTiernan J), 370 (Gibbs J), 384 (Stephen J), 391 (Mason J), 403-404 (Jacobs J), 417 (Murphy J).
[263] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 340-341.
[264] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 342.
[265] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 378-379 (Gibbs J), 393-400 (Mason J), 404-407 and 412-415 (Jacobs J), 419 (Murphy J).
[266] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 378 (Gibbs J).
[267] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 378 (Gibbs J).
[268] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 379 (Gibbs J) citing authority accepting this proposition as *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431-432 (Knox CJ and Gavin Duffy J), 437-441 (Isaacs J) and *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 at 10 (Knox CJ, Gavan Duffy, Rich and Starke JJ). See also *Attorney-General for Victoria (In re Victorian Chamber of Manufacturers) v Commonwealth* (1935) 52 CLR 533 at 567 (Starke J).

> The *Constitution* effects a distribution between the Commonwealth and the States of all power, not merely of legislative power. We are in no way concerned in the present case to consider the scope of the prerogative or the circumstances in which the Executive may act without statutory sanction. Once it is concluded that the Plan is one in respect of which legislation could not validly be passed, it follows that public moneys of the Commonwealth may not lawfully be expended for the purposes of the Plan.[269]

Justice Mason distinguished the power to appropriate from the powers necessary to exercise the appropriation.[270] This distinction was important because he accepted that the s 81 phrase 'purposes of the Commonwealth' was 'for such purposes as Parliament may determine'[271] but that for the Commonwealth to engage in the activity appropriated 'depends upon the extent of the Commonwealth's legislative, executive and judicial powers'.[272] As there was no legislation in this case, the only possible power was the executive power.[273] In addressing the s 61 phrase 'extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth' he said:

> Although the ambit of the power is not otherwise defined by Ch II it is evident that in scope it is not unlimited and that its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the *Constitution*, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the *Constitution* itself and the character and status of the Commonwealth as a national government. The provisions of s 61 taken in conjunction with the federal character of the *Constitution* and the distribution of powers between the Commonwealth and the States make any other conclusion unacceptable. Moreover, it is a view of the executive power which is confirmed by the past decisions of this Court.[274]

Usefully, Justice Mason provided some direction on ascertaining the scope of the executive power.[275] These directions included: the s 61 executive power coupled with the s 51 (xxxix) incidental powers 'adds a further dimension to what may be achieved by the Commonwealth in the exercise of other specific powers';[276] and 'certain implied powers which stem from its existence and its character as a polity'[277] that extended beyond 'internal security and protection of the State against disaffection and subversion' to include 'a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.[278] Justice Mason was, however, careful to state that the powers for activities appropriate for a national government were limited:

> … the executive power to engage in activities appropriate to a national government, arising as it does from an implication drawn from the *Constitution* and having no counterpart, apart from the incidental power, in the expressed heads of legislative power, is limited in scope. It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the *Constitution*, thereby enabling the

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[269] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 379 (Gibbs J).

[270] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 393-394 (Mason J).

[271] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 396 (Mason J) citing agreement with Chief Justice Latham in *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 256.

[272] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 396 (Mason J).

[273] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 396 (Mason J).

[274] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 396-397 (Mason J) citing *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 432 (Knox CJ and Gavan Duffy J) and *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 at 10 (Knox CJ, Gavan Duffy, Rich and Starke JJ).

[275] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397-398 (Mason J).

[276] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J) citing *Burns v Ransley* (1949) 79 CLR 101 and *King v Sharkey* (1949) 79 CLR 121 as examples.

[277] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J) citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 187-188 (Dixon J) as an example.

[278] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J) citing as examples the establishment of the Commonwealth Scientific and Industrial Research Organization, the *Science and Research Act 1951* (Cth) and the expenditure of 'money on inquiries, investigation and advocacy in relation to matters affecting public health, notwithstanding the absence of a specific legislative power other than quarantine'.

> Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government … [The presence of s 96] confirms what is otherwise deducible from the *Constitution*, that is, that the executive power is not unlimited and that there is a very large area of activity which lies outside the executive power of the Commonwealth but which may become the subject of conditions attached to grants under s 96.[279]

In resolving the present case Justice Mason considered that the appropriation was valid but that the activities to which that appropriation were to be applied were 'outside the realm of the executive power … That the money in question is given to the department does not bring the establishment or the activities of the Regional Councils within the ambit of constitutional power'.[280]

Justice Jacobs rejected the contention that appropriations were only possible for purposes already addressed in legislation.[281] He stated:

> The power to legislate in respect of matters falling within the prerogative arises under s 51 (xxxix) in so far as it does not arise under any other particular head of power. Alternatively the course of power is the inherent sovereignty of the Australian Parliament in all subject matters which lie within the province of the Government of the Commonwealth of Australia. The Parliament is sovereign over the Executive and whatever is within the competence of the Executive under s 61, including or as well as the exercise of the prerogative within the area of the prerogative attached to the Government of Australia, may be the subject of legislation of the Australian Parliament.[282]

Justice Jacobs then went on to reason that the 'general and particular power prescribed in the *Constitution*' was expanding to 'adhere fully to Australia as a nation externally and internally sovereign':[283]

> The growth of national identity results in a corresponding growth in the area of activities which have an Australian rather than a local flavour. Thus, the complexity and values of a modern national society result in a need for co-ordination and integration of ways and means of planning for that complexity and reflecting those values. Inquiries on a national scale are necessary and likewise planning on a national scale must be carried out. Moreover, the complexity of society, with its various interrelated needs, requires co-ordination of services designed to meet those needs.[284]

Justice Jacobs concluded that the Plan was within the Commonwealth's powers conferred by the *Constitution*: both as an exercise of executive power in s 61 'to formulate and co-ordinate plans and purposes which require national rather than local planning' and the incidental power in s 51 (xxxix) 'the execution by the Commonwealth of its wide powers respecting social welfare'.[285]

And finally, Justice Murphy merely accepted that '[t]he appropriation is within the powers of the Parliament and the spending is authorized by the *Appropriation Act* and the consequential executive powers (s 61)'.[286] In effect, Justice Murphy appeared to be accepting that it was for the Parliament to determine 'the purposes of the Commonwealth' in s 81,[287] and consequently, failing a specific enumerated power the s 51 (xxxix) incidental powers would authorise expenditure for those

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[279] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 398 (Mason J).
[280] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 401 (Mason J).
[281] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 404-405 (Jacobs J).
[282] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 406 (Jacobs J).
[283] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 406 (Jacobs J) citing Justice Starke in *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 266.
[284] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 412-413 (Jacobs J). Notably, research and exploration were other examples.
[285] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 413 (Jacobs J).
[286] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 419 (Murphy J).
[287] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 419 (Murphy J) citing Chief Justice Latham in *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 254-256.

purposes.[288] In the present case he considered that the expenditure for the Plan was also authorised by a number of enumerated powers and the s 51 (xxxix) incidental powers.[289]

Davis v Commonwealth (1988) 166 CLR 79

Like the earlier decisions in *Burns v Ransley* and *R v Sharkey*, *Victoria v Commonwealth and Hayden* illustrated the broad potential of the incidental powers coupled with the executive power in the *Constitution* ss 51(xxxix) and 61 to legitimise executive power. This perspective was entrenched by the decision in *Davis v Commonwealth*. In *Davis v Commonwealth*, the Australian Bicentennial Authority, a company incorporated in the Australian Capital Territory, was empowered by the *Australian Bicentennial Authority Act 1980* (Cth) to exclusive use of certain words, signs and symbols[290] as part of a scheme to promote and protect the Bicentennial celebration of the first European settlement in Australia.[291] The plaintiffs produced clothing items using some of the prescribed words, signs and symbols.[292] The plaintiffs sought the Authority's permission to use some of the prescribed words, signs and symbols and this was refused.[293] The plaintiffs then asserted that various provisions addressing the Bicentennial celebration were ultra vires the *Constitution*'s executive powers and also sought an order from the court that various provisions of the *Australian Bicentennial Authority Act 1980* (Cth) were beyond the *Constitution*'s legislating powers.[294] Meanwhile the Commonwealth asserted that the *Australian Bicentennial Authority Act 1980* (Cth) was authorised by s 51(xxxix) as a law with respect to a matter incidental to the executive power of the Commonwealth in s 61.[295]

Chief Justice Mason and Justices Deane and Gaudron considered the extent of the executive power under s 61 enabled 'Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the *Constitution* and to the spheres of responsibility vested in it by the *Constitution*'.[296] These 'responsibilities' were both the 'legislative powers effected by the *Constitution* itself and from the character and status of the Commonwealth as a national polity'.[297] In their judgment:

> If we ask the question whether the commemoration of the Bicentenary is a matter falling within the peculiar province of the Commonwealth in its capacity as the national and federal government, the answer must be in the affirmative. That is not to say that the States have no interest or no part to play in the commemoration. Clearly they have such an interest and such a part to play, whether as part of an exercise in co-operative federalism or otherwise. But the interest of the States in the commemoration of the Bicentenary is of a more limited character. It cannot be allowed to obscure the plain fact that the commemoration of the Bicentenary is pre-eminently the business and the concern of the Commonwealth as the national government and as such falls fairly and squarely within the federal executive power.[298]

As a consequence of finding the Bicentennial celebration was within the executive power, Chief Justice Mason and Justices Deane and Gaudron concluded that incorporation of the company to carry out the scheme was a valid exercise of that power,[299] that s 51(xxxix) authorizes legislation regulating the administration, procedures, powers and protection that might be appropriate to such

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[288] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 419 and 424 (Murphy J).
[289] See *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 419-420 (Murphy J).
[290] *Davis v Commonwealth* (1988) 166 CLR 79 at 89-91 (Mason CJ, Deane and Gaudron JJ).
[291] *Davis v Commonwealth* (1988) 166 CLR 79 at 88 (Mason CJ, Deane and Gaudron JJ).
[292] *Davis v Commonwealth* (1988) 166 CLR 79 at 91 (Mason CJ, Deane and Gaudron JJ), 104 (Brennan J).
[293] *Davis v Commonwealth* (1988) 166 CLR 79 at 91 (Mason CJ, Deane and Gaudron JJ), 104-105 (Brennan J).
[294] *Davis v Commonwealth* (1988) 166 CLR 79 at 92 (Mason CJ, Deane and Gaudron JJ), 105 (Brennan J).
[295] *Davis v Commonwealth* (1988) 166 CLR 79 at 107 (Brennan J).
[296] *Davis v Commonwealth* (1988) 166 CLR 79 at 93 (Mason CJ, Deane and Gaudron JJ) citing *Barton v Commonwealth* (1975) 131 CLR 477 at 498 (Mason J).
[297] *Davis v Commonwealth* (1988) 166 CLR 79 at 93 (Mason CJ, Deane and Gaudron JJ) citing *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 396-397 (Mason J) and *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 187-188 (Dixon J).
[298] *Davis v Commonwealth* (1988) 166 CLR 79 at 94 (Mason CJ, Deane and Gaudron JJ).
[299] *Davis v Commonwealth* (1988) 166 CLR 79 at 94-95 (Mason CJ, Deane and Gaudron JJ).

an authority,[300] and that the appropriations were valid.[301] These justices also commented that the nature and status of the Commonwealth as a national polity might substitute the authority of s 51(xxxix), but considered it 'unnecessary for us to pursue this question'.[302] However, their perspective was a significant development:

> … that the legislative powers of the Commonwealth extend beyond the specific powers conferred upon the Parliament by the *Constitution* and include such powers as may be deduced from the establishment and nature of the Commonwealth as a polity.[303]

Justices Wilson, Dawson and Toohey agreed with Chief Justice Mason and Justices Deane and Gaudron's conclusions.[304] They were, however, more circumspect about the legislating power of the Commonwealth outside the bounds of the *Constitution*.[305] Justices Wilson and Dawson concluded that in the present matter the executive power in s 61 and the incidental powers in s 51(xxxix) were sufficient.[306] In their view 'the existence and nature of the *Constitution* as the foundation of a body politic'[307] was not required:

> We are unable to conceive of an implication of the kind described that would not be sufficiently and accurately described in the terms of s 61 supported by s 51(xxxix). Indeed, the execution and maintenance of the *Constitution* and of the laws of the Commonwealth are concepts which seem to us to comprehend all that is to be implied 'from the existence and nature of the *Constitution* as the foundation of a body politic'.[308]

Similarly, Justice Toohey was in 'general agreement' with Justices Wilson and Dawson,[309] and cautioned:

> For the purpose of disposing of the demurrer it is not necessary to take a firm position on the matter. But I am presently not persuaded that any implied power arising only from the creation of the Commonwealth as a body politic extends beyond steps necessary to protect the existence of the government … the character and status of the Commonwealth as a national government is an element to be considered in the construction of s 61 of the *Constitution* … But s 61 carries its own warning that the executive power of the Commonwealth 'extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth'. That power cannot transgress the *Constitution*. However it is entirely appropriate to treat s 61, in conjunction with s 51(xxxix), as authorizing the Commonwealth to commemorate the Bicentenary of the first European settlement in Australia.[310]

Justice Brennan framed the determinative issue in the case as a legislative power conferred by s 51(xxxix) as incidental to the exercise of executive power under s 61.[311] Addressing the scope of the s 51(xxxix) incidental power, however, required the extent of the s 61 executive powers to be ascertained.[312] This Justice Brennan did agreeing with the formulation of Justice Jacobs in *Victoria v Commonwealth and Hayden*:

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300 *Davis v Commonwealth* (1988) 166 CLR 79 at 95 (Mason CJ, Deane and Gaudron JJ).
301 *Davis v Commonwealth* (1988) 166 CLR 79 at 95 (Mason CJ, Deane and Gaudron JJ).
302 *Davis v Commonwealth* (1988) 166 CLR 79 at 95 (Mason CJ, Deane and Gaudron JJ) citing the reasoning of Justice Dixon in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
303 *Davis v Commonwealth* (1988) 166 CLR 79 at 93 (Mason CJ, Deane and Gaudron JJ).
304 *Davis v Commonwealth* (1988) 166 CLR 79 at 101 (Wilson and Dawson JJ), 117 (Toohey J).
305 *Davis v Commonwealth* (1988) 166 CLR 79 at 101 (Wilson and Dawson JJ), 117 (Toohey J).
306 *Davis v Commonwealth* (1988) 166 CLR 79 at 101-104 (Wilson and Dawson JJ).
307 Referring to Justice Fullagar in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 266 in the context of considering Justice Dixon's minority assertion of a power in the nature of the polity established by the *Constitution* and that was rejected as a source of authority by Justice Fullagar: *Davis v Commonwealth* (1988) 166 CLR 79 at 102 (Wilson and Dawson JJ).
308 *Davis v Commonwealth* (1988) 166 CLR 79 at 102 (Wilson and Dawson JJ).
309 *Davis v Commonwealth* (1988) 166 CLR 79 at 117 (Toohey J).
310 *Davis v Commonwealth* (1988) 166 CLR 79 at 119 (Toohey J).
311 *Davis v Commonwealth* (1988) 166 CLR 79 at 107-108 (Brennan J).
312 *Davis v Commonwealth* (1988) 166 CLR 79 at 107 (Brennan J).

> Section 61 refers not only to the execution and maintenance of the laws of the Commonwealth (a function characteristically to be performed by execution of statutory powers); it refers also to 'the execution and maintenance of this *Constitution*' (a function to be performed by execution of powers which are not necessarily statutory). I respectfully agree with Jacobs J that the phrase 'maintenance of this *Constitution*' imports the idea of Australia as a nation. I would briefly state my reasons for holding that the function which that phrase assigns to the Executive Government relates not only to the institutions of government but more generally to the protection and advancement of the Australian nation.[313]

After concluding that there existed the s 61 executive powers to protect the nation,[314] and that together with s 51(xxxix), they authorised the protection and maintenance of the Government,[315] Justice Brennan concluded:

> This Court has not settled the questions whether and to what extent it is within the executive power of the Commonwealth for the Executive Government of the Commonwealth to exercise its prerogative powers or to engage in lawful activities or enterprises calculated to advance the national interest. Though the *Constitution* gives no express answer to these questions, the answer may be derived from what the *Constitution* was intended to do and has done. With great respect to those who hold an opposing view,[316] the *Constitution* did not create a mere aggregation of colonies, redistributing powers between the government of the Commonwealth and the governments of the States. The *Constitution* summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite 'in one indissoluble Federal Commonwealth', melding their history, embracing their cultures, synthesizing their aspirations and their destinies. The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition. The end and purpose of the *Constitution* is to sustain the nation. If the executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood – a flag or anthem, eg – or the benefit of many national initiatives in science, literature and the arts. It does not follow that the Executive Government of the Commonwealth is the arbiter of its own power or that the executive power of the Commonwealth extends to whatever activity or enterprise the Executive Government deems to be in the national interest. But s 61 does confer on the Executive Government power 'to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation', to repeat what Mason J said in the *AAP Case*.[317] In my respectful opinion, that is an appropriate formulation of a criterion to determine whether an enterprise or activity lies within the executive power of the Commonwealth. It invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit. The variety of enterprises or activities which might fall for consideration preclude the a priori development of detailed criteria but, as cases are decided, perhaps more precise tests will be developed.[318]

Usefully, Justice Brennan then states:

> The scope of the legislative power conferred by s 51(xxxix) in conjunction with s 61 depends on what the Executive Government has done or intends to do in execution of its power. Section 51(xxxix) confers a power to make a law not with respect to the subject-matter of an executive power of the Commonwealth, nor even with respect to a matter incidental to that subject-matter; it confers a power to make a law only with respect to a matter 'incidental to the execution' of an executive power of the Commonwealth.[319]

Applying these principles Justice Brennan considered defendants acts attributed to exercising executive power: making an agreement between the Commonwealth and the States and

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[313] *Davis v Commonwealth* (1988) 166 CLR 79 at 109-110 (Brennan J) citing Justice Jacobs in *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 405-406.

[314] Citing *Burns v Ransley* (1949) 79 CLR 101 at 109-110 (Latham CJ).

[315] *Davis v Commonwealth* (1988) 166 CLR 79 at 110 (Brennan J).

[316] Perhaps referring to *Commonwealth v Tasmania* (1983) 158 CLR 1 at 108-109 (Gibbs CJ). See also, for examples, *Colonial Sugar Refining Co Ltd v Attorney-General* (1912) 15 CLR 182 at 214-215 (Isaacs J); *Smith v Oldham* (1912) 15 CLR 355 at 365 (Isaacs J); *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 437-439 (Isaacs J); *Davis v Commonwealth* (1988) 166 CLR 79 at 93-94 (Mason CJ, Deane and Gaudron JJ); and so on.

[317] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J).

[318] *Davis v Commonwealth* (1988) 166 CLR 79 at 110-111 (Brennan J).

[319] *Davis v Commonwealth* (1988) 166 CLR 79 at 111 (Brennan J).

incorporating the Authority.[320] Justice Brennan considered that both were valid exercises of executive power and did not require any further legislative authority to be effective.[321]

The significance of *Davis v Commonwealth* in the line of authority from *Burns v Ransley*, *R v Sharkey* and *Victoria v Commonwealth and Hayden*, and in contrast with the narrower approach in *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd*, is to demonstrate that the scope of the incidental powers coupled with the executive power in the *Constitution* ss 51(xxxix) and 61 is potentially considerable. How that power is justified within the text of the *Constitution*, however, remains unsettled with the judgments displaying a range of perspectives. The following judgments in *Pape v Commissioner of Taxation* illustrate the recent approaches of the High Court and incredibly broad potential of the executive power, but that there are some limits.

Pape v Commissioner of Taxation (2009) 238 CLR 1

In *Pape v Commissioner of Taxation* (see also ¶5.9.2, p 155; ¶7.6.1, p 222; ¶7.6.3, p 231) a majority of the High Court concluded that the power to spend an amount that had been validly appropriated depended on one of the various powers set out in the *Constitution* other than s 81,[322] and this could include the executive power in s 61 (read with s 51(xxxix)).[323] Here a taxpayer challenged the validity of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) that appropriated one-off payments to 8.7 million taxpayers as part of a 'fiscal stimulus' responding to the 'global financial crisis'.[324] In response to the taxpayer's challenge, the Commonwealth contended that, and failing this, that the appropriation was supported by the executive power derived from ss 61 read with the incidental power from 51(xxxix).[325] Only Chief Justice French and Justices Gummow, Crennan and Bell reached a decision founded on the executive power with the incidental power,[326] Justices Hayne and Kiefel relied on another power (taxation)[327] and Justice Heydon found no suitable powers.[328] The various reasons about the appropriateness of the executive power read with the incidental power (ss 61 read with 51(xxxix)) were significant in demonstrating that the scope of the executive power remains contested.

Chief Justice French reviewed the various authorities and commentary over the decades[329] and concluded that the executive power of the Commonwealth included both the prerogatives and 'the "capacities" which may be possessed by persons other than the Crown'.[330] In concluding that the spending under the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) appropriation was within the scope of s 61 (read with s 51(xxxix)), Chief Justice French preferred a reading of the content of that power as being 'consistent' with:[331]

> … the executive power as broadly explained by Mason CJ, Brennan, Deane and Gaudron JJ in [*Davis v Commonwealth*], and by Mason J in the passage from [*R v Duncan; Ex parte Australian Iron & Steel Pty Ltd*] quoted in [*R*

320 *Davis v Commonwealth* (1988) 166 CLR 79 at 111 (Brennan J).
321 *Davis v Commonwealth* (1988) 166 CLR 79 at 111 (Brennan J).
322 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55 (French CJ), 74 and 82-83 (Gummow, Crennan and Bell JJ), 113 (Hayne and Kiefel JJ), 210-213 (Heydon J).
323 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 23, 55 and 64 (French CJ), 67, 74, 78, 83 and 91-92 (Gummow, Crennan and Bell JJ), 98, 99-102, 121 and 124 (Hayne and Kiefel JJ), 198-199 (Heydon J).
324 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 22-23 (French CJ), 67 (Gummow, Crennan and Bell JJ), 95 and 98 (Hayne and Kiefel JJ), 151 (Heydon J).
325 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 33 (French CJ), 117 (Gummow, Crennan and Bell JJ), 101-102 and 114 (Hayne and Kiefel JJ), 134 (Heydon J).
326 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 23 and 64 (French CJ), 83 and 90-91 (Gummow, Crennan and Bell JJ).
327 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 133 (Hayne and Kiefel JJ).
328 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 134 and 216 (Heydon J).
329 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 60-64 (French CJ).
330 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 60 (French CJ) citing in respect of 'capacities' *Davis v Commonwealth* (1988) 166 CLR 79 at 108 (Brennan J).
331 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63-64 (French CJ).

> *v Hughes*]. To say that the executive power extends to the short-term fiscal measures in question in this case does not equate it to a general power to manage the national economy. In this case the Commonwealth had the resources and the capacity to implement within a short time-frame measures which, on the undisputed facts, were rationally adjudged as adapted to avoiding or mitigating the adverse effects of global financial circumstances affecting Australia as a whole, along with other countries.[332]

The relevant passages in *Davis v Commonwealth* cited by Chief Justice French were:[333]

> '… s 61 confers on the Commonwealth all the prerogative powers of the Crown except those that are necessarily exercisable by the States under the allocation of responsibilities made by the *Constitution* and those denied by the *Constitution* itself. Thus the existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence'.[334]

> 'But s 61 does confer on the Executive Government power "to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation", to repeat what Mason J said in the [*Victoria v Commonwealth and Hayden*].[335] In my respectful opinion, that is an appropriate formulation of a criterion to determine whether an enterprise or activity lies within the executive power of the Commonwealth. It invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in cooperation with the States) to secure the contemplated benefit. The variety of enterprises or activities which might fall for consideration preclude the a priori development of detailed criteria but, as cases are decided, perhaps more precise tests will be developed'.[336]

The relevant passage in *R v Hughes* quoting Justice Mason in *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* cited by Chief Justice French was:[337]

> 'The scope of the executive power is to be ascertained, as I indicated in the [*Victoria v Commonwealth and Hayden*],[338] from the distribution of the legislative powers effected by the *Constitution* and the character and status of the Commonwealth as a national government. Of necessity the scope of the power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constituent elements in the federation'.[339]

The result for Chief Justice French was to find the spending within the executive power, albeit a limited conclusion to the circumstances of this case:

> The executive power extends, in my opinion, to short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole, where such measures are on their face peculiarly within the capacity and resources of the Commonwealth Government … To say that the executive power extends to the short-term fiscal measures in question in this case does not equate it to a general power to manage the national economy. In this case the Commonwealth had the resources and the capacity to implement within a short time-frame measures which, on the undisputed facts, were rationally adjudged as adapted to avoiding or mitigating the adverse effects of global financial circumstances affecting Australia as a whole, along with other countries.[340]

Reaching the same conclusion in this case,[341] Justices Gummow, Crennan and Bell considered that:

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[332] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63-64 (French CJ).
[333] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 62 (French CJ).
[334] *Davis v Commonwealth* (1988) 166 CLR 79 at 93-94 (Mason CJ, Deane and Gaudron JJ).
[335] This being *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J).
[336] *Davis v Commonwealth* (1988) 166 CLR 79 at 111 (Brennan J).
[337] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63 (French CJ).
[338] This being *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J).
[339] *R v Hughes* (2000) 202 CLR 535 at 554-555 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.); *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535 at 560 (Mason J).
[340] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63-64 (French CJ).
[341] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63-64 (French CJ).

> … the executive power of the Commonwealth enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the *Constitution* and having regard to the spheres of responsibility vested in it.[342]

As a consequence:

> … the phrase 'maintenance of this *Constitution*' in s 61 imports more than a species of what is identified as 'the prerogative' in constitutional theory. It conveys the idea of the protection of the body politic or nation of Australia.[343]

Justices Gummow, Crennan and Bell then identified their preferred 'formulation' of the likely scope of executive power citing Justice Brennan in *Davis v Commonwealth*:

> 'It does not follow that the Executive Government of the Commonwealth is the arbiter of its own power or that the executive power of the Commonwealth extends to whatever activity or enterprise the Executive Government deems to be in the national interest. But s 61 does confer on the Executive Government power "to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation", to repeat what Mason J said in the [*Victoria v Commonwealth and Hayden*].[344] In my respectful opinion, that is an appropriate formulation of a criterion to determine whether an enterprise or activity lies within the executive power of the Commonwealth'.[345]

This 'formulation' was, however, limited by the considerations that:[346]

> … while s 51(xxxix) authorises the Parliament to legislate in aid of the executive power, that does not mean that it may do so in aid of any subject which the Executive Government regards as of national interest and concern.[347]

For Justices Gummow, Crennan and Bell the appropriated one-off payments to taxpayers as part of a 'fiscal stimulus' in response to the 'global financial crisis' was 'an example of the engagement by the Executive Government in activities peculiarly adapted to the government of the country and which otherwise could not be carried on for the public benefit', and within the scope of the s 61 with s 51(xxxix) executive powers.[348] Importantly, this also recognised that the scope of the executive power was limited,[349] and that the scope of the power was more easily established addressing matters beyond the competence of the States (such as a 'global financial crisis').[350]

Justices Hayne and Kiefel reached a different conclusion, albeit relying on a similar analysis of the nature and scope of ss 61 and 51(xxxix) but a different application of the principles.[351] Justices Hayne and Kiefel framed the Commonwealth's contentions about ss 61 and 51(xxxix) as:

> … necessarily proposed a particular understanding of the structure of the Federation … an executive power with respect to expenditure limited only by the necessity to secure the approval of the Parliament for that expenditure. And because both the initiative for expenditures and the making of expenditures are matters for the executive, the understanding of the Federation for which the Commonwealth contends is one which gives the executive of the

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[342] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 83 (Gummow, Crennan and Bell JJ) citing *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 464 (Gummow J).
[343] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 83 (Gummow, Crennan and Bell JJ).
[344] This being *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J).
[345] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 87 (Gummow, Crennan and Bell JJ) citing *Davis v Commonwealth* (1988) 166 CLR 79 at 111 (Brennan J).
[346] Justices Gummow, Crennan and Bell, like Chief Justice French, also pointing to *R v Hughes* (2000) 202 CLR 535 at 555 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ): *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63 (French CJ), 87 (Gummow, Crennan and Bell JJ).
[347] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 87-88 (Gummow, Crennan and Bell JJ).
[348] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 91-92 (Gummow, Crennan and Bell JJ).
[349] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 89 (Gummow, Crennan and Bell JJ).
[350] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 90 (Gummow, Crennan and Bell JJ) citing *Davis v Commonwealth* (1988) 166 CLR 79 at 111 (Brennan J).
[351] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 123-124 (Hayne and Kiefel JJ).

> Commonwealth an unlimited power to propose financial expenditures and, subject to parliamentary appropriation, power to make those expenditures that is in no way limited by subject-matter or purpose.[352]

In rejecting these Commonwealth contentions as '[s]uch an understanding of the structure of the Federation does not fit easily with the long-accepted understanding of the constitutional structure, … of separate polities, separately organised, continuing to exist as such, in which the central polity is a government of limited and defined powers',[353] Justices Hayne and Kiefel considered that the executive power was limited,[354] but citing the words of Justice Mason in *Barton v Commonwealth* about executive power:

> 'extends to the execution and maintenance of the *Constitution* and of the laws of the Commonwealth. It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the *Constitution* and to the spheres of responsibility vested in it by the *Constitution*'.[355]

For Justices Hayne and Kiefel those 'spheres of responsibility vested in [the Commonwealth] by the *Constitution*' included 'responsibilities derived from the character and status of the Commonwealth as a national polity'.[356] By this the Justices expounded Justice Dixon in *Attorney-General (Vic) v Commonwealth*:

> 'These are things which, whether in reference to the external or internal concerns of government, should be interpreted widely and applied according to no narrow conception of the functions of the central government of a country in the world of to-day'.[357]

And Justice Mason in *Victoria v Commonwealth*:

> '[T]here is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.[358]

And the later statement of Justice Mason in *Victoria v Commonwealth*:

> 'It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the *Constitution*, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government'.[359]

The result was to conclude that the executive power is bounded,[360] and that the High Court had a limited role in determining the proper exercise of that power:

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[352] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 114-115 and 118-120 (Hayne and Kiefel JJ).
[353] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 114-115 (Hayne and Kiefel JJ) citing *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) and *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82 (Dixon J).
[354] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 115-116 (Hayne and Kiefel JJ) and citing *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 396 (Mason J).
[355] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 116 (Hayne and Kiefel JJ) and citing *Barton v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J).
[356] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 116 (Hayne and Kiefel JJ).
[357] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 116 (Hayne and Kiefel JJ) citing *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237 at 269 (Dixon J).
[358] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 116 (Hayne and Kiefel JJ) citing *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J).
[359] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 117 (Hayne and Kiefel JJ) citing *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 398 (Mason J).
[360] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 118-120 (Hayne and Kiefel JJ).

> Describing the expenditure in issue in this matter as a 'short term fiscal [measure] to meet adverse economic conditions affecting the nation as a whole' engages no constitutional criterion of a kind hitherto enunciated by this court. It is a description that conflates the distinction between ends and means that this court must maintain. It is for the political branches of government, not this court, to fix upon the ends to be sought by legislative or executive action. It is for the court, not the political branches of government, to decide whether the means chosen to achieve particular political ends are constitutionally valid and it is for the court to identify the criteria that are to be applied to determine whether those particular means are constitutionally valid.
>
> The question for decision is whether the response that has been made (by the enactment of the [*Tax Bonus for Working Australians Act (No 2) 2009* (Cth)]) is within power. That question is not answered by pointing out why the Impugned Act was enacted.[361]

Answering this question, Justices Hayne and Kiefel considered that the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) was valid as a law with respect to taxation when 'read down' to a more limited class of recipients,[362] and that spending for that law was validly authorised by the ss 61 and 51(xxxix) executive power:[363]

> In the end the Commonwealth's submissions about the executive and incidental powers came down to the proposition that the Commonwealth's power to spend is limited only by the need to obtain parliamentary approval for the proposed expenditure. That contention should be rejected … Its acceptance would not be consistent with what Mason J referred [in *Victoria v Commonwealth*][364] to as 'the broad division of responsibilities between the Commonwealth and the states achieved by the distribution of legislative powers' and would, by 'enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government', effect a radical transformation in what has hitherto been thought to be the constitutional structure of the nation.[365]

The significant difference for Justices Hayne and Kiefel, compared to Chief Justice French and Justices Gummow, Crennan and Bell, was the nature and scope of the executive power derived from the conceptions of the 'federal polity'.[366] Chief Justice French and Justices Gummow, Crennan and Bell accepted that a Commonwealth response to the 'global financial crisis' was itself sufficient to engage the ss 61 and 51(xxxix) executive powers.[367] In contrast Justices Hayne and Kiefel considered that a response to a 'global financial crisis' was not enough because that 'carries with it difficulties and dangers that raise fundamental questions about the relationship between the judicial and other branches of government'.[368] Thus Justices Hayne and Kiefel required a specific identified legislative power to support the impugned legislation, and then the executive powers under ss 61 and 51(xxxix) would support that expenditure.[369] For Chief Justice French and Justices Gummow, Crennan and Bell the executive powers under ss 61 and 51(xxxix) alone were sufficient.[370]

In dissent Justice Heydon provided a comprehensive rejection of the Commonwealth's propositions. Essentially his analysis is relevant because his analysis provided a more detailed critique of the Commonwealth's various propositions, because he distinguished between an implied legislative 'nationhood power' and a similar 'Executive "nationhood power"' under the *Constitution* ss 51(xxxix) and 61. The Commonwealth asserted, in part, (i) that 'the executive power of the Commonwealth under s 61 included a "nationhood power" to which support could be given by legislation resting for its validity on s 51(xxxix)' (an 'Executive "nationhood power"'), and (ii) that

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[361] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 122 (Hayne and Kiefel JJ).
[362] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 133 (Hayne and Kiefel JJ).
[363] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 124 (Hayne and Kiefel JJ).
[364] Being *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 398 (Mason J).
[365] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 124 (Hayne and Kiefel JJ).
[366] Compare *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 62-64 (French CJ), 89-92 (Gummow, Crennan and Bell JJ), 124 (Hayne and Kiefel JJ).
[367] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63-64 (French CJ), 91-92 (Gummow, Crennan and Bell JJ).
[368] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 122-123 (Hayne and Kiefel JJ).
[369] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 123-124 (Hayne and Kiefel JJ).
[370] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63-64 (French CJ), 91-92 (Gummow, Crennan and Bell JJ).

'there was an executive power (independently of any nationhood power) to manage the national economy, in both good times and bad, or, more narrowly, in emergencies, to which support could be given by legislation resting for its validity on s 51(xxxix)' (an 'Executive national fiscal power').[371]

The Commonwealth argued that the 'nationhood power' was that identified by Justice Mason in *Victoria v Commonwealth and Hayden*:[372]

> So far it has not been suggested that the implied powers extend beyond the area of internal security and protection of the State against disaffection and subversion.[373] But in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation *and which cannot otherwise be carried on for the benefit of the nation* (emphasis added).[374]

The Commonwealth then argued that the 'Executive "nationhood power"' under the *Constitution* ss 51(xxxix) and 61 was that same Justice Mason in *Victoria v Commonwealth and Hayden* proposition, but *without* the words 'and which cannot otherwise be carried on for the benefit of the nation' (the concluding thirteen words).[375] About these words Justice Brennan in *Davis v Commonwealth*, agreeing with Justice Mason in *Victoria v Commonwealth and Hayden*, had said:[376]

> … invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit.[377]

Justice Heydon addressed the concluding thirteen words of Justice Mason and showed that the measures set out in the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) could have been addressed through other means consistent with the *Constitution* and other existing Commonwealth and State arrangements.[378] He then concluded: 'the concluding thirteen words of Mason J's test are not satisfied. That is no doubt why the defendants chose to abandon them'.[379] Next he addressed the words 'enterprises and activities peculiarly adapted to the government of a nation', and after considering the range of authorities and approaches to a 'nationhood power',[380] concluded the conception was too vague and infected with redistributing the powers between the Commonwealth and States.[381] The proposition that the executive power includes or supports a 'nationhood power' was, however, not finally addressed because 'the defendants have failed to establish that it has been satisfied'.[382] Justice Heydon then addressed and rejected the Commonwealth's other narrower contention about an 'Executive national fiscal power' – that the executive power read with the incidental power extended to dealing with 'a national fiscal emergency only capable of being promptly and appropriately met out of the resources of the Commonwealth, both financial and administrative'.[383] The contention was rejected because there were other avenues available to address a national fiscal emergency, there is no such constitutional power, and meanings of the words 'crises' and 'emergencies' for constitutional purposes 'would be to give an "unexaminable" power to the Executive'.[384]

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371 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 169 (Heydon J).
372 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 178 (Heydon J).
373 This referring to *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 187-188 (Dixon J).
374 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J).
375 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 178 (Heydon J).
376 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 178 (Heydon J).
377 *Davis v Commonwealth* (1988) 166 CLR 79 at 111 (Brennan J).
378 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 178-180 (Heydon J).
379 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 180 (Heydon J).
380 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 180-191 (Heydon J).
381 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 191 (Heydon J).
382 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 191 (Heydon J).
383 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 192 (Heydon J).
384 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 192-193 (Heydon J).

The Commonwealth also argued that 'the executive power of the Commonwealth must extend to expending money that is lawfully appropriated … when the Parliament appropriates money, s 61 authorises its expenditure'.[385] Critical to this contention was the Commonwealth's other contention that the executive power to spend was coextensive with the scope of the legislative power to appropriate that itself was for any purpose determined by the Parliament.[386] Justice Heydon, after examining the various contours of these contentions,[387] concluded that even if the Parliament could appropriate for any purpose, 'it was not within the power of the Executive under s 61 to expend the appropriated funds to pay tax bonuses'.[388] Perhaps poignantly:

> If the executive power of the Commonwealth could be used to make payments independently of s 96 in relation to matters outside the legislative competence of the Commonwealth, there would exist a means of bypassing the restrictions on that legislative power in ss 51 and 52, and bypassing the need to ensure, in effect, State consent to s 96 payments. The Commonwealth could make conditional grants to or contracts with corporations or non-corporations inducing them by douceurs to do what it could not compel them to do by legislation. That would read the *Constitution* in such a fashion as to be internally inconsistent.[389]

The significance of *Pape v Commissioner of Taxation* was to demonstrate that there appears to be a crystallising of views about the formulation of the scope of executive power among the High Court of Chief Justice French and Justices Gummow, Hayne, Heydon, Crennan, Kiefel and Bell, but some disagreement about its particular application.[390] A wide application accepted by Chief Justice French and Justices Gummow, Crennan and Bell, and a narrow application accepted by Justices Hayne, Heydon and Kiefel. Thus Chief Justice French and Justices Gummow, Hayne, Heydon, Crennan, Kiefel and Bell all favoured the 'formulation' of the scope of executive power traced back through the various cited authorities[391] as that expressed by Justice Mason in *Victoria v Commonwealth and Hayden*.[392] That is:

> … a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.[393]

Undoubtedly, these 'enterprises and activities' will also include contracting and various other commercial activities.[394] Thus as a broadly framed scope of power, Justice Mason's expression in

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385 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 194 (Heydon J).
386 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 194 and 198 (Heydon J).
387 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 194-199 (Heydon J).
388 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 199 (Heydon J).
389 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 199 (Heydon J).
390 For another perspective see Andrew McLeod, 'The Executive and Financial Powers of the Commonwealth: Pape v Commissioner of Taxation' (2010) 32 *Sydney Law Review* 123 at 132-138.
391 For Chief Justice French this was Justices Brennan in *Davis v Commonwealth* (1988) 166 CLR 79 at 111 and Justice Mason in *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535 at 560 that was quoted by Chief Justice Gleeson and Justices Gaudron, McHugh, Gummow, Hayne and Callinan in *R v Hughes* (2000) 202 CLR 535 at 554-555. For Justices Gummow, Crennan and Bell this was Justices Brennan in *Davis v Commonwealth* (1988) 166 CLR 79 at 111. For Justices Hayne and Kiefel this was Justice Dixon in *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 269, Justice Mason in *Barton v Commonwealth* (1974) 131 CLR 477 at 498, and Chief Justice Mason and Justices Deane and Gaudron in *Davis v Commonwealth* (1988) 166 CLR 79 at 93. For Justice Heydon this is merely accepting the Commonwealth's proposition according to Justice Mason in *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 *without* the concluding thirteen words.
392 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63 (French CJ), 87 (Gummow, Crennan and Bell JJ), 116 (Hayne and Kiefel JJ), 177-178 (Heydon J).
393 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J) citing as examples the establishment of the Commonwealth Scientific and Industrial Research Organization, the *Science and Research Act 1951* (Cth) and the expenditure of 'money on inquiries, investigation and advocacy in relation to matters affecting public health, notwithstanding the absence of a specific legislative power other than quarantine'.
394 See *Johnson v Kent* (1975) 132 CLR 164 at 170 (Barwick CJ), 172 (McTiernan J), 172 (Stephen J), 174 (Jacobs J) (build recreational facilities); *New South Wales v Bardolph* (1934) 52 CLR 455 at 509 (Dixon J) (enter contracts); and so on. See also Harold Renfree, *The Executive Power of the Commonwealth of Australia* (1984) pp 469-484; Enid Campbell,

Victoria v Commonwealth and Hayden, and the related propositions in the other judgments,[395] is potentially very broad. Justice Mason, however, cautioned that:

> It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the *Constitution*, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government.[396]

This caution appears to have been significant for Justices Hayne, Heydon and Kiefel,[397] albeit Chief Justice French and Justices Gummow, Hayne, Heydon, Crennan, Kiefel and Bell all considered that the power was limited:[398] Chief Justice French noted that elucidating the content of the executive power (including an 'Executive "nationhood power"')[399] was to be 'distinguished from the discovery by implication of a "nationhood" power as an implied head of legislative competence'.[400] Chief Justice French also warned that the power would be applied conservatively where the executive power alone was relied on for 'the control or regulation of conduct or activities under coercive laws';[401] Justices Gummow, Hayne, Heydon, Crennan, Kiefel and Bell warned that the executive power with the incidental power could not be relied on for *any* subject that the Executive Government regarded or formulated as of a national interest and concern.[402] And it was the disagreement about the power's particular application that marked the difference between Chief Justice French and Justices Gummow, Crennan and Bell, Justices Hayne and Kiefel, and Justice Heydon. Justices Hayne and Kiefel considered that 'the argument by reference to national "crisis" or "emergency" can be summed up as being "[t]here is a crisis; if the Commonwealth cannot do this, who can?"',[403] and this was not sufficient to enliven the executive power – in their view this would have been 'a radical transformation in what has hitherto been thought to be the constitutional structure of the nation'.[404] Justice Heydon expressed a similar perspective.[405] This difference in perspectives between Chief Justice French and Justices Gummow, Crennan and Bell and Justices Hayne and Kiefel perhaps demonstrates that while the formulation of the scope of the executive power appears fairly well settled its application is essentially a matter of what particular judges consider to be an appropriate capacity (an enterprise or activity) for the Commonwealth Executive. As Justice Heydon's judgment illustrates there are credible alternative perspectives adequately

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'Commonwealth Contracts' (1970) 44 *Australian Law Journal* 14; George Winterton, *Parliament, The Executive and The Governor-General: A Constitutional Analysis* (1983) pp 44-47; J Richardson, 'The Executive Power of the Commonwealth' in Leslie Zines (ed) *Commentaries on the Australian Constitution* (1977) pp 72-76.

395 These include those identified in *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63 (French CJ), 87 (Gummow, Crennan and Bell JJ), 116 (Hayne and Kiefel JJ).

396 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 398 (Mason J).

397 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 124 (Hayne and Kiefel JJ), 180-181 (Heydon J).

398 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63 (French CJ), 87-88 (Gummow, Crennan and Bell JJ), 118-119 and 121 (Hayne and Kiefel JJ), 181-191 (Heydon J).

399 This was the terminology used by Justice Heydon to distinguish between a separate and implied legislative 'nationhood power' and a similar power forming part of the *Constitution* ss 51(xxxix) and 61 Executive power: *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 169, 183 and 191 (Heydon J).

400 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63 (French CJ) citing *Davis v Commonwealth* (1988) 166 CLR 79 at 103-104 (Wilson and Dawson JJ). The other justices probably also accept this proposition: Justices Gummow, Crennan and Bell as they examined the required power to resolve the authority for *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) under the *Constitution* ss 51(xxxix) and 61 and not as an implied 'nationhood power' (at 90-92); Justices Hayne and Kiefel separately consider the power under the *Constitution* ss 51(xxxix) and 61 and an implied 'nationhood power' (at 114-124 and 124-126 respectively); and Justice Heydon also separately consider the power under the *Constitution* ss 51(xxxix) and 61 and an implied 'nationhood power' (at 177-191 and 169-177 respectively).

401 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 24 (French CJ).

402 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 88 (Gummow, Crennan and Bell JJ), 117 (Hayne and Kiefel JJ), 181 (Heydon J).

403 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 122 (Hayne and Kiefel JJ).

404 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 124 (Hayne and Kiefel JJ).

405 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 180 and 191 (Heydon J).

supported by the very same authority, including Justice Mason expression in *Victoria v Commonwealth and Hayden*.[406] Thus, while not determinative in the final decision, Justice Heydon detailed analysis is likely to be critical in any future nuanced application of ss 51(xxxix) and 61. The immediate impact of the decision, however, is likely to be endorsement from the judgments of Chief Justice French and Justices Gummow, Crennan and Bell for a broad view that the s 61 executive power read with the s 51(xxxix) incidental power justifies Commonwealth legislative action for issues affecting or concerning the nation as a whole, and where Commonwealth action is peculiarly within the capability, capacity and resources of the Commonwealth.[407]

5.5 Delegated legislative powers

The separation between the Parliament and the Executive is less strictly defined than the separation between the Judiciary and the Executive (see above Chapter 2 'Separation of Powers').[408] There is no doubt that the Parliament can delegate its legislative powers[409] to the Executive[410] and to a limited extent to the Judiciary.[411] The Parliament cannot, however, abdicate its legislative power.[412] The remaining question is how much legislating power can the Parliament delegate before the legislative power has been abdicated. Unfortunately there is no clear benchmark with the cases providing mere guidance.

Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73

Thus in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (see also ¶3.3, p 35) the *Transport Workers Act 1928* (Cth) gave the Governor-General in Council almost unlimited power to

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406 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 178 (Heydon J).

407 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 63 (French CJ), 89 (Gummow, Crennan and Bell JJ).

408 See *Attorney-General (Cth) v R* (1957) 95 CLR 529 at 536-537, 538 and 540 (Simonds LJ); *R v Anderson, ex parte Ipec Air Pty Ltd* (1965) 113 CLR 177 at 206 (Windeyer J); *Radio Corporation Pty Ltd v Commonwealth* (1938) 59 CLR 170 at 184 (Latham CJ); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 100-102 (Dixon J), 114 and 120 (Evatt J); and so on. See also Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590 at 606.

409 Within, of course, the *Constitution*'s legislating authority: see, for example, *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 86 (Rich J), 101 (Dixon J), 119-120 (Evatt J).

410 See *Baxter v Ah Way* (1909) 8 CLR 626 at 634-636 (Griffith CJ), 639-640 (O'Connor J), 644 (Isaacs J), 645-646 (Higgins J); *Roche v Kronheimer* (1921) 29 CLR 329 at 337 (Knox CJ, Gavan Duffy, Rich and Starke JJ), 340 (Higgins J); *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492 at 499 (Rich J), 506 (Starke J), 512 (Dixon J), 518 (Evatt J); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 84 (Gavan Duffy CJ and Starke J), 86-87 (Rich J), 101-102 (Dixon J), 117-119 (Evatt J); *Radio Corporation Pty Ltd v Commonwealth* (1938) 59 CLR 170 at 179 (Latham CJ), 186 (Rich J), 186 (Starke J), 190 (Dixon and Evatt JJ), 193 (McTiernan J); *R v Federal Court of Bankruptcy, ex parte Lowenstein* (1938) 59 CLR 556 at 565 (Latham CJ), 573 (Rich J), 576 (Starke J); *Wishart v Fraser* (1941) 64 CLR 470 at 477 (Rich ACJ), 479 (Starke J), 484 (Dixon J), 487 (McTiernan J), 489 (Williams J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 256-257 (Fullagar J); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 279-280 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), 311-312 (Williams J), 329 (Webb J), 337-338 (Taylor J); *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 373-374 (Barwick CJ), 381 (Menzies J), 383-384 (Windeyer J); *Esmonds Motors Pty Ltd v Commonwealth* (1970) 120 CLR 463 at 476-478 (Menzies J); *Capital Duplicators Pty. Ltd. v Australian Capital Territory* (1992) 177 CLR 248 at 265 (Mason CJ, Dawson and McHugh JJ), 270 and 280-281 (Brennan, Deane and Toohey JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *New South Wales v Commonwealth* (2006) 229 CLR 1 at 175-176 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); and so on.

411 See *Attorney-General (Cth) v R* (1957) 95 CLR 529 at 538-539 and 540-541 (Simonds LJ); *R v Federal Court of Bankruptcy, ex parte Lowenstein* (1938) 59 CLR 556 at 565 (Latham CJ), 573 (Rich J), 576 (Starke J), 587-588 (Dixon and Evatt JJ); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 92 (Dixon J); *R v Davison* (1954) 90 CLR 353 at 369 (Dixon CJ and McTiernan J); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 279-280 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), 311-312 (Williams J), 329 (Webb J), 337-338 (Taylor J); and so on.

412 *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 373-374 (Barwick CJ), 379 (Kitto J), 381 (Menzies J), 385 (Windeyer J); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 86-87 (Rich J), 100-101 (Dixon J), 121 (Evatt J); *Ex parte Walsh & Johnson; In re Yates* (1925) 37 CLR 36 at 83 and 107 (Isaacs J); *Capital Duplicators Pty. Ltd. v Australian Capital Territory* (1992) 177 CLR 248 at 264-265 (Mason CJ, Dawson and McHugh JJ), 270-271 (Brennan, Deane and Toohey JJ); and so on. See also George Winterton, 'Can the Commonwealth Parliament Enact "Manner and Form" Legislation' (1980) 11 *Federal Law Review* 167 at 192.

make regulations (the *Waterside Employment Regulations 1931* (Cth)) dealing with the employment of transport workers.[413] The appellants were convicted of an offence under the *Waterside Employment Regulations 1931* (Cth) that required preference be given to unionist and returned serviceman when they were available to work[414] when they gave preference to workers who were neither unionists nor returned servicemen when unionists were available to work.[415] The appellants challenged, in part, the validity of the *Transport Workers Act 1928* (Cth) to empower the making of regulations on the basis the Parliament could not delegate its law making powers to the Executive (as they were a 'separate' source of power).[416] The High Court rejected these contentions finding the Parliament had ample authority for both the form and content of the laws and that it was essentially for the Parliament to determine how is powers were to be applied.[417] For present purposes, it is the contrasting approaches of Justices Dixon and Evatt that are relevant because they were expressly referred to in the later decision in *New South Wales v Commonwealth* suggesting that there are very few limits on the Parliament's ability to delegate.[418]

In the words of Justice Dixon:

> It may be acknowledged that the manner in which the *Constitution* accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repository of the legislative power of the Commonwealth. The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law. In English law much weight has been given to the dependence of subordinate legislation for its efficacy, not only on the enactment, but upon the continuing operation of the statute by which it is so authorized. The statute is conceived to be the source of obligation and the expression of the continuing will of the Legislature … After the long history of parliamentary delegation in Britain and the British colonies, it may be right to treat subordinate legislation which remains under parliamentary control as lacking the independent and unqualified authority which is an attribute of true legislative power, at any rate when there has been an attempt to confer any very general legislative capacity. But, whatever may be its rationale, we should now adhere to the interpretation which results from the decision of *Roche v Kronheimer* (footnote omitted).[419]

The decision in *Roche v Kronheimer* meant, from Justice Dixon's perspective:

> … that a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the *Constitution* does not operate to restrain the power of the Parliament to make such a law.[420]

In short, Justice Dixon appears to conceive that a valid statute is necessary, and further:

> This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power. Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority … But the

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[413] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 82-83 (Gavan Duffy CJ and Starke J), 86 (Rich J), 88 (Dixon J), 111 (Evatt J).

[414] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 83 (Gavan Duffy CJ and Starke J), 88 (Dixon J), 111 (Evatt J).

[415] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 82-83 (Gavan Duffy CJ and Starke J), 88-89 (Dixon J), 111 (Evatt J).

[416] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 85 (Gavan Duffy CJ and Starke J), 86 (Rich J), 89 (Dixon J), 113 (Evatt J).

[417] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 83 (Gavan Duffy CJ and Starke J), 87 (Rich J), 102 and 111 (Dixon J), 123-124 (Evatt J).

[418] See *New South Wales v Commonwealth* (2006) 229 CLR 1 at 175-182 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[419] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 102 (Dixon J).

[420] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 101 (Dixon J). Notably, confirming his opinion expressed in *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492 at 512 (Dixon J).

> explanation should be sought not in a want of uniformity in the application to the different organs of government of the consequences of the division of powers among them, but in the ascertainment of the nature of the power which that division prevents the Legislature from handing over.[421]

Similarly, Justice Evatt required an indefinable head or heads of legislative power:

> … the Parliament of the Commonwealth is not competent to 'abdicate' its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws and thereby exercise legislative power, for it does so in almost every statute; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the *Constitution*. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned.[422]

This alone, for Justice Evatt, was not enough,[423] as he also appeared to require some practical justification for the delegation so that the delegated legislative power is 'one peculiarly adapted for the exercise of rule-making power by the Executive rather than by the Legislature itself':[424]

> What s 3 committed to regulation by the Executive Government was not the whole but a small though important part of the subject matter of inter-State and foreign trade. The Commonwealth Parliament had before its consideration the necessity of securing continuity of operations in sea-going trade and commerce. Apparently it believed that interruption of services might occur by reason of trouble and disturbance in connection with the work of loading and unloading trading vessels. It did not consider itself able to lay down a rigid or general rule which could not be altered to meet the changing circumstances of the particular work. But it expressly reserved to each House of Parliament the right, under certain circumstances, of disallowing any regulations. It also had the knowledge that the body entrusted with the regulation-making power would exercise that power upon the advice of Ministers directly responsible to Parliament. It must be taken as considering that, if an emergency threatened the smooth and regular working of vessels, rules which had been made might require immediate modification or repeal, or new rules might have to be made upon the subject. One of the subject matters mentioned in s 3 was the 'protection' of transport workers. The degree of protection required would vary not only from time to time, but from place to place throughout the Commonwealth. The services of Parliament might not be available for the purpose of considering the repeal or alteration of a regulation which was obstructing the free movement of vessels in the described trade and commerce, and a lapse of hours might be disastrous. All these considerations support the view that the subject matter described in s 3 was one peculiarly adapted for the exercise of rule-making power by the Executive rather than by the Legislature itself.[425]

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

More recent High Court decisions appear to accept as a general proposition that 'the structure of the *Constitution* does not preclude the Parliament from authorising in wide and general terms subordinate legislation under any of the heads of its legislative power'.[426] Thus, while the High Court did not have to decide the matter in *Plaintiff S157/2002 v Commonwealth* (see also ¶3.3, p 37), the Commonwealth had argued:

> … that the Parliament might validly delegate to the Minister 'the power to exercise a totally open-ended discretion as to what aliens can and what aliens cannot come to and stay in Australia', subject only to this Court deciding any dispute as to the 'constitutional fact' of alien status. Alternatively, it was put that the Act might validly be redrawn to

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[421] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 101 (Dixon J).
[422] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 121 (Evatt J).
[423] A bare head or heads of power would have been about legislative power rather than the subject of the legislative power (such as trade and commerce): see *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 123 (Evatt J).
[424] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 124 (Evatt J).
[425] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 123-124 (Evatt J).
[426] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) citing *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (without particular point reference). See also *New South Wales v Commonwealth* (2006) 229 CLR 1 at 175-176 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

> say, in effect, '[h]ere are some non-binding guidelines which should be applied', with the 'guideline' being the balance of the statute.[427]

In saying 'something more respecting the employment of a legislative device for the "reading up" of decision-making powers conferred upon the Executive branch of government',[428] Justices Gaudron, McHugh, Gummow, Kirby and Hayne considered that such a provision 'might well be ineffective' stating:

> But what may be 'delegated' is the power to make laws with respect to a particular head in s 51 of the *Constitution*. The provisions canvassed by the Commonwealth would appear to lack that hallmark of the exercise of legislative power identified by Latham CJ in *Commonwealth v Grunseit*, namely, the determination of 'the content of a law as a rule of conduct or a declaration as to power, right or duty'. Moreover, there would be delineated by the Parliament no factual requirements to connect any given state of affairs with the constitutional head of power. Nor could it be for a court exercising the judicial power of the Commonwealth to supply this connection in deciding litigation said to arise under that law. That would involve the court in the rewriting of the statute, the function of the Parliament, not a Ch III court.[429]

New South Wales v Commonwealth (2006) 229 CLR 1

Later in *New South Wales v Commonwealth* the plaintiffs accepted that 'it was open to Parliament to authorise subordinate legislation "in wide and general terms … under any of the heads of its legislative power"',[430] arguing in the words of Justice Dixon in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* that the delegation of the regulation making authority was "'such a width or such an uncertainty of the subject matter … handed over" by the Parliament to the Executive that it was *not* a law with respect to any identifiable head of Commonwealth legislative power' (emphasis added).[431] In this case the *Workplace Relations Act 1996* (Cth) provided '[t]he regulations may specify matters that are *prohibited content* for the purposes of this Act' (emphasis added),[432] the regulation making provision then provided:

> The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters:
> (a) required or permitted by this Act to be prescribed; or
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.[433]

The plaintiff's contention was that content of '*prohibited content*' was not defined or confined by the *Workplace Relations Act 1996* (Cth) so that it was whatever the Executive government wanted it to mean and invalid as a consequence, relying on the proposition of Justice Dixon in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan*.[434] Chief Justice Gleeson, and Justices Gummow, Hayne, Heydon and Crennan rejected the plaintiff's contention finding that the *Workplace Relations*

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[427] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[428] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[429] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512-513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[430] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 175 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) citing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[431] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 175 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) citing *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 101 (Dixon J).
[432] *Workplace Relations Act 1996* (Cth) s 356. See *New South Wales v Commonwealth* (2006) 229 CLR 1 at 175 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[433] *Workplace Relations Act 1996* (Cth) s 846(1).
[434] See *New South Wales v Commonwealth* (2006) 229 CLR 1 at 175 and 178 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

Act 1996 (Cth) did provide sufficient limits.[435] Further, and significantly, the regulation making provision was in broad terms and that justified a broad ambit of subordinate legislation:[436]

> The new Act has laid down the main outlines of policy in relation to workplace agreements but has indicated an intention of leaving it to the Executive to work out that policy in relation to what workplace agreements may not contain by specific regulation. Section 356 thus has a wide ambit. Its ambit must be construed conformably with the scope and purposes of the new Act as a whole, and with the provisions of Pt 8 in relation to workplace agreements in particular. The extent of the power is marked out by inquiring whether any particular regulation about the prohibited content of workplace agreements can be said to have a rational connection with the regime established by the new Act for workplace agreements.[437]

The result was, despite considering the particular approach to drafting in the *Workplace Relations Act 1996* (Cth) as 'an undesirable one which ought to be discouraged',[438] to find the regulation making provisions valid.[439] In effect the High Court sanctioning a particularly broad approach to subordinate regulation making that only required a 'rational connection'.[440] While not rejecting the proposition of Justice Dixon in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan*, the majority cast the degree of 'wide and general terms … under any of the heads of its legislative power' potentially very, very broadly. The likely consequences were perhaps best articulated by Justice Kirby:

> Under the *Constitution*, it is the duty of this Court to uphold the law-making and supervisory powers of the Parliament. We should not sanction still further erosion of those powers and their effective transfer to the Executive Government, whether appearing in vague, indeterminate and open-ended appropriations … or in vague, indeterminate and open-ended regulation-making powers … There comes a point when a regulation-making power becomes so vague and open-ended that the law which establishes it ceases to be a law with respect to a subject of federal law-making power, becoming instead a bare federal attempt to control and expel State laws. When that line is crossed, this Court has a duty to say so.
>
> Until this Court exhibits its disapproval in a judicial fashion, by invalidating such provisions, the lesson of history is that executive governments will present such provisions in increasing number to distracted or inattentive legislators. The legislators will be unlikely to notice them in the huge mass of legislative materials, such as those presented in the present case, and contest them. They will overlook the affront to proper parliamentary supervision, particularly in the context of regulation-making provisions that are typically found at the end of bills and ordinarily attract little parliamentary attention because they are assumed to be in the standard form.
>
> The relationship between the Parliament's function of lawmaking and the legitimate delegation to the Executive Government of promulgating regulations to carry a law into effect, is a point of great constitutional significance … The plaintiffs' challenge to the constitutional acceptability of the mode of delegation adopted in the present legislation should be upheld both to defend the proper constitutional role of the federal Parliament and to discourage future similar measures. The impugned provisions border on an endeavour to enact an abdication of the Parliament's responsibilities. This Court should say so and forbid it.[441]

In addressing the perspective of Justice Evatt in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan*, the majority only relied on his proposition that 'a provision in a statute conferring the power to make regulations "ordinarily … will … retain the character of a law with respect to the subject matter dealt with in the statute"'.[442] The majority accepted the plaintiff's submission 'that Evatt J's

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[435] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 180-181 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[436] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 181 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) citing *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ).

[437] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 178-180 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[438] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 175 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[439] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 182 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[440] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 180 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[441] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 197-198 (Kirby J).

[442] *New South Wales v Commonwealth* (2006) 229 CLR 1 at 181 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) citing *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 121 (Evatt J).

statement was predicated on the existence of "a scheme contained in the statute itself" which the regulations were to carry out' but found there was such a scheme in the *Workplace Relations Act 1996* (Cth).[443] The significant point is that the majority did not reject Justice Evatt's proposition that there needed to be a relationship between the subject matter of the regulation and its principal Act, but they did not restate the requirement that the delegated legislative power is 'one peculiarly adapted for the exercise of rule-making power by the Executive rather than by the Legislature itself'[444].

Thus, the result of the decision in *New South Wales v Commonwealth* would appear to be that the delegation of legislative powers is permissible if: (i) there is a suitable constitutional head of power for the legislation; (ii) a 'rational connection' between the regulation and the Act; and (iii) the degree to which a regulation might abdicate the Parliament's role through being 'wide and general terms … under any of the heads of its legislative power' is potentially very, very broad.[445]

5.6 The 'Commonwealth' as the juristic entity

The juristic entity of the executive government' of the Commonwealth is 'The Commonwealth of Australia' that performs executive acts and is the legal entity of the Executive.[446] This is supported by references to 'the Commonwealth'[447] in the *Constitution* in respect of the High Court's original jurisdiction,[448] the authority for Parliament to confer rights to proceed against 'the Commonwealth',[449] and the content of 'The Executive Government'.[450] This appears to have been settled by the High Court.

Commonwealth v Rhind (1966) 119 CLR 584

Thus in *Commonwealth v Rhind* the Minister for the Interior had authorized the Chief Property Officer to sign for and on behalf of the Commonwealth of Australia all notices to quit.[451] The defendant was a tenant of premises owned by the Commonwealth in the State of New South Wales and received a notice to quit.[452] The defendant then failed to deliver up possession of the premises within the time specified whereupon the Commonwealth commenced an action to eject the defendant in the Supreme Court of New South Wales.[453] Relevantly the *Lands Acquisition Act 1955* (Cth) provided that '[f]or the purposes of acquiring, holding and disposing of land (including land outside Australia) and for all purposes of this Act, the Commonwealth is a body corporate, by the name of "The Commonwealth of Australia"'.[454] The primary judge had decided the matter, in part, on the basis that the Supreme Court lacked jurisdiction because the corporation created by the *Lands Acquisition*

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443 *New South Wales v Commonwealth* (2006) 229 CLR 1 at 181-182 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

444 *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 124 (Evatt J).

445 Recalling that the *Transport Workers Act 1928* (Cth) in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 85 (Gavan Duffy CJ), 87 (Rich J), 100 and 102 (Dixon J), 123-124 (Evatt J) was valid and had provided: 'The Governor-General may make regulations not inconsistent with this Act, which, *notwithstanding anything in any other Act* but subject to the *Acts Interpretation Act 1901-1918* and the *Acts Interpretation Act 1904-1916*, shall have the force of law …' (emphasis added). In short, delegated legislation can override other Acts of Parliament, and in this case the regulation would prevail over all earlier Acts other than those specifically mentioned. Other examples of broad and valid authority in delegated legislation includes: '[a]ny body corporate or unincorporate the existence of which the Governor-General, by order published in the Gazette, *declares to be in his opinion*, prejudicial to the defence of the Commonwealth …' (emphasis added) (*National Security (Subversive Associations) Regulations 1940* (Cth): *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 136 (Latham CJ), 150 (Rich J), 152 (Starke J), 157 (McTiernan J).

446 See *Judiciary Act 1903* (Cth) ss 56, 57, 61 and 63.

447 Established by the *Constitution of the Commonwealth of Australia Act 1900* (UK) ss 4 and 6.

448 *Constitution* ss 75(iii) and (v).

449 *Constitution* s 78.

450 *Constitution* ss 61-70.

451 *Commonwealth v Rhind* (1966) 119 CLR 584 at 589 (Barwick CJ), 607 (Owen J).

452 *Commonwealth v Rhind* (1966) 119 CLR 584 at 589-590 (Barwick CJ), 607 (Owen J).

453 *Commonwealth v Rhind* (1966) 119 CLR 584 at 590 (Barwick CJ), 607 (Owen J).

454 See *Commonwealth v Rhind* (1966) 119 CLR 584 at 608-609 (Owen J).

Act 1955 (Cth) was not the Crown.[455] In rejecting the primary judge's contentions Chief Justice Barwick stated:

> There is but one juristic entity known as the Commonwealth of Australia. It was called into being by the *Constitution*. I am unable to comprehend the suggested distinction between this entity and the juristic person, the Commonwealth of Australia, supposedly incorporated, but as I think unnecessarily and with futility, by … the *Lands Acquisition Act* [*1955* (Cth)]. Also, in my opinion, the Commonwealth of Australia is the Crown in right of the Commonwealth whenever or wherever the Commonwealth acts or is affected in an executive capacity.[456]

Similarly, Justice Taylor stated:

> I do not agree with the learned judge of first instance that [the *Lands Acquisition Act 1955* (Cth)] creates a body corporate which is distinct and separate from the Commonwealth of Australia and that that corporation is not a corporation which represents the Commonwealth. The enactment of such a provision was entirely unnecessary as the Commonwealth itself has a corporate capacity in that the Constitution which established the Commonwealth quite clearly contemplates it as having a capacity to sue and be sued, to hold lands and other property and to bind itself by the making of agreements.[457]

Of the other judges, Justice McTiernan agreed with Chief Justice Barwick,[458] Justice Menzies considered 'that whatever may have been the purposes of … the *Lands Acquisition Act* [*1955* (Cth)]' the plaintiff was the Crown in the right of the Commonwealth of Australia,[459] and Justice Owen concluded that 'the Commonwealth of Australia[] was [not] a different juristic entity from the Commonwealth of Australia established by the *Constitution*'.[460]

The Executive itself, however, prefers the term 'Australian Government' to 'Commonwealth of Australia' and has preferred this terminology in its practical dealings from the early 1970s.[461] The practice of the courts, however, demonstrates that the juristic entity that may sue or be sued is the 'Commonwealth of Australia'.[462] So in *Barton v Commonwealth* the question before the High Court was framed: '[d]oes the executive power of the Commonwealth of Australia enable the Australian Government to make a request to the Government of Brazil' for the extradition of some Australian citizens?[463] The entity of the Executive against which the action was characterised was 'The Commonwealth of Australia'.[464] The term 'Australian Government' is now used extensively as part of a 'branding strategy',[465] and appears only to be limited by those circumstances requiring the constitutionally correct name and style to be adopted:

> The 'Commonwealth of Australia' is the legal entity established by the *Constitution*. It is sometimes referred to simply as 'the Commonwealth'. Where the term 'Commonwealth Government' is used, it will normally be appropriate to replace that term with 'Australian Government'. However, in implementing the new branding requirements, care will need to be taken not to replace references to the 'Commonwealth of Australia' or 'the Commonwealth', where

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455 *Commonwealth v Rhind* (1966) 119 CLR 584 at 599 (Barwick CJ), 606 (Menzies J), 608-609 (Owen J).
456 *Commonwealth v Rhind* (1966) 119 CLR 584 at 599 (Barwick CJ).
457 *Commonwealth v Rhind* (1966) 119 CLR 584 at 603 (Taylor J).
458 *Commonwealth v Rhind* (1966) 119 CLR 584 at 599 (Barwick CJ), 600 (McTiernan J).
459 *Commonwealth v Rhind* (1966) 119 CLR 584 at 606 (Menzies J).
460 *Commonwealth v Rhind* (1966) 119 CLR 584 at 611 (Owen J).
461 See Editor, 'The Term "Australian Government"' (1974) 48 *Australian Law Journal* 1 at 1-3; Editor, 'The Terms "Australia" and "Australian Government"' (1975) 49 *Australian Law Journal* 511 at 511-513.
462 Despite some early references to the 'Australian Government', the High Court generally did not refer to the Executive of the Commonwealth as the 'Australian Government' until *Barton v Commonwealth* (1974) 131 CLR 477 at 481-482 (Barwick CJ), 490 (McTiernan and Menzies JJ), 491, 493 and 502-503 (Mason J), 504-505 and 507 (Jacobs J). See also *Ferrando v Pearce* (1918) 25 CLR 241 at 248 (Barton J), 259 (Higgins J), 280 and 282 (Powers J); *R v Sutton* (1908) 5 CLR 789 at 801-802 (Barton J).
463 *Barton v Commonwealth* (1974) 131 CLR 477 at 482 (Barwick CJ), 490 (McTiernan and Menzies JJ), 493 (Mason J), 504 (Jacobs J).
464 See *Barton v Commonwealth* (1974) 131 CLR 477 at 477.
465 Department of the Prime Minister and Cabinet, *Design Guidelines* (2008) p 11.

> that term is used to describe the entity established by the *Constitution* or in a geographic sense, with references to the Australian Government.[466]

5.7 The Inter-State Commission

The *Constitution* expressly provides for an 'Inter-State Commission':

> There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this *Constitution* relating to trade and commerce, and of all laws made thereunder.[467]

This is a unique provision in that it vests executive power in the Inter-State Commission rather than the Queen, and is the only repository of the executive power other than the Governor-General in the *Constitution*.[468] Following the High Court's majority decision in *New South Wales v Commonwealth* in 1915 the apparent authority and effectiveness of the Inter-State Commission was severely diminished.[469] The Inter-State Commission has existed twice: from 1913 to 1920 and from 1984 to 1989.[470] The Commission ceased in 1989 following repeal of the *Inter-State Commission Act 1975* (Cth) by the *Industry Commission Act 1989* (Cth).[471]

5.8 The Executive and the common law

There is little doubt that the common law applies to the Executive and to its exercises of authority:[472] '[t]he *Constitution* is framed on the "unexpressed assumption that the one common law surrounds us and that it applies where it has not been superseded by statute"':[473]

> The Commonwealth of Australia was not born into a vacuum. It came into existence within a system of law already established. To much of that law the Commonwealth is necessarily subject; for example, the Commonwealth has no general power to legislate with respect to the law of property, the law of contract, the law of tort. In relation to those subjects, speaking generally, it lives and moves and has its being within a system of law which consists of the common law (in the widest sense) and the statute law of the various States.[474]

In short, the Executive is bound by the common law. Notably, however, where a State law modifies the common law then that modified law may be limited by a valid Commonwealth law or have a limited operation on the Commonwealth's Executive.[475]

5.9 Role of international governmental bodies

The Commonwealth has attained the status of a sovereign, independent and federal nation with a role in the international domain of nations.[476] The result is that the Commonwealth through the Executive participates in, and adopts, practices from the international sphere:

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466 Department of the Prime Minister and Cabinet, *Design Guidelines* (2008) p 11. See also *Acts Interpretation Act 1901* (Cth) s 17(a).

467 *Constitution* s 101.

468 Compare *Constitution* ss 61, 68, 70 and 101. See John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 895-899. See also *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 56 (French CJ); J E Richardson, 'The Executive Power of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (1977) pp 53-54.

469 See *New South Wales v Commonwealth* (1915) 20 CLR 54 (Griffith CJ, Barton, Isaacs, Gavan Duffy, Powers and Rich JJ).

470 See Michael Coper, 'The Second Coming of the Fourth Arm: the role and functions of the Inter-State Commission' (1989) 63 *Australian Law Journal* 731; Ian Radbone, 'The Interstate Commission' (1982) 41 *Australian Journal of Public Administration* 232.

471 See *Industry Commission Act 1989* (Cth) ss 48(2) and (3).

472 See Owen Dixon, 'The Common Law as the Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240 at 241; Owen Dixon, 'Sources of Legal Authority' (1965) *Jesting Pilate* 198 at 199.

473 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 452 (McHugh J) citing Dixon, 'The Common Law as the Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240 at 241.

474 *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 521 (Latham CJ).

475 See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 473-474 (Gummow J) and the references therein.

> Australia was established as a new political entity and Australia was to be given control of her own external affairs. Under s 61 of the *Constitution* the Executive Government of the Commonwealth can deal administratively with the external affairs of the Commonwealth ... The execution and maintenance of the *Constitution*, particularly when considered in relation to other countries, involves ... the establishment of relations at any time with other countries, including the acquisition of rights and obligations upon the international plane. The most obvious example of such action is to be found in the negotiation and making of treaties with foreign countries.[477]

Importantly, while it is the Executive in the exercise of its prerogative powers that may acquire rights and obligations in the international sphere (including the making and ratification of treaties), it remains for the Parliament to make laws that affect individual rights and obligations under that law.[478] The critical questions are then what are the effects of the Executive's acquisition of rights and obligations in the international sphere, what authority does this provide to the Parliament to legislate and what effect does this have on the Parliament's authority to legislate. These questions are addressed next.

5.9.1 The effects of the Executive's acquisition of rights and obligations

The rights and obligations entered into by the Executive may, however, influence the common law and create 'legitimate expectations' that the Executive decision-makers will act in conformity with those rights and obligations.[479] As an exception to the Parliament making laws that affect individual rights and obligations under that law, the majority of the High Court in *Minister for Immigration v Teoh* reached the conclusion that the ratification of a convention was an adequate basis, in the absence of some legislative or Executive statement to the contrary, that Executive decision-makers would act in accordance with the convention.[480] The Executive at the time interpreted this decision to have the following effect:

> In the *Teoh* case the majority of the High Court held that entry into a treaty by Australia creates a 'legitimate expectation' in administrative law that the Executive Government and its agencies will act in accordance with the terms of the treaty, even where those terms have not been incorporated into Australian law. The High Court held that, where a decision-maker proposes to make a decision which is inconsistent with such a legitimate expectation, procedural fairness requires that the person affected by the decision be given notice and an adequate opportunity to put arguments on the point. The High Court made clear that such an expectation cannot arise where there is either a statutory or executive indication to the contrary.[481]

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[476] See *Australia Act 1986* (Cth) Long Title. See also *Victoria v Commonwealth* (1996) 187 CLR 416 at 477-478 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) and the references therein. See also Legal and Constitutional Affairs Committee, Senate, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1996) pp 46-52; J G Starke, 'The Commonwealth in International Affairs', in R Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) p 349.

[477] *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643-644 (Latham CJ). See also *Victoria v Commonwealth* (1996) 187 CLR 416 at 478 and 480-482 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 193 (Gibbs J), 211-212 (Stephen J), 237-240 (Murphy J); *Barton v Commonwealth* (1974) 131 CLR 477 at 488 (Barwick CJ), 491 (McTiernan and Menzies JJ), 498 (Mason J), 505-506 (Jacobs J); and so on.

[478] See *Minister for Immigration v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J), 298-299 (Toohey J), 304 (Gaudron J) and the references therein. See also Legal and Constitutional Affairs Committee, Senate, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1996) pp 45-46. The only exception to this proposition is treaties terminating a state of war: see *Chow Hung Ching v R* (1948) 77 CLR 449 at 478 (Dixon J); *Bradley v Commonwealth* (1973) 128 CLR 557 at 582 (Barwick CJ and Gibbs J). See generally Anne Twomey, 'Federal Parliament's Changing Role in Treaty Making and External Affairs' in Geoffrey Lindell and Robert Bennett, *Parliament: The Vision in Hindsight* (2001) pp 37-92.

[479] See *Dietrich v R* (1992) 177 CLR 292 at 321 (Brennan J) (*International Covenant on Civil and Political Rights*); *Mabo v Commonwealth (No 2)* (1992) 175 CLR 1 at 42 (Brennan J) (Optional Protocol to the International Covenant on Civil and Political Rights). See also Legal and Constitutional Affairs Committee, Senate, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1996) pp 86-95 and the references therein.

[480] *Minister for Immigration v Teoh* (1995) 183 CLR 273 at 291 (Mason CJ and Deane J), 303 (Toohey J), 304 (Gaudron J).

[481] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1996, pp 231-235 (Alexander Downer, Minister for Foreign Affairs); Commonwealth, *Parliamentary Debates*, Senate, 2 May 1996, pp 217-228 (Robert Hill, Leader of the Government in the Senate).

The Executive subsequently made statements,[482] and introduced legislation[483] expressing the necessary 'indication to the contrary'.[484] In various incarnations the *Administrative Decisions (Effect of International Instruments) Bill* was unable to gain majority support in the Senate and finally lapsed with the proroguing of Parliament for the 2001 election.[485] The likely effect of the statements and proposed legislation was to clarify that international instruments entered into by the Executive were not to affect the decisions of the Executive unless expressly given effect by legislation.[486] In the recent decision in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* Justices McHugh, Gummow, Hayne and Callinan cast serious doubt on the weight that might be given to the decision in *Minister for Immigration v Teoh*.[487] There remains, however, some ambiguity about exactly what the Executive commitment in the international sphere means, although it clearly does mean something of consequence:[488]

> … in various respects, an unincorporated treaty, left in that state, may be invoked in various ways in the conduct of domestic affairs. For example, a peace treaty will, without legislation, change the status of enemy aliens in Australian courts. Further, the taking of a step by the executive government in the conduct of external affairs, whilst of itself neither creating rights nor imposing liabilities, may supply a step in a broader process of resolution of justiciable disputes. The so-called 'disguised extradition' cases are an example. The treatment of public policy objections in the conflict of laws may be another. More frequently encountered are the rules of statutory interpretation which favour construction which is in conformity and not in conflict with Australia's international obligations; this matter was discussed by Mason CJ and Deane J in *Teoh* (footnotes omitted).[489]

The Executive has now adopted a consultation process with the Parliament as a reform of the treaty-making process that involves scrutiny *but* not formal approval.[490]

5.9.2 What authority does this provide to the Parliament to legislate?

The other aspect of the Executive acquiring rights and obligations is the extent to which the Executive can extend the ambit of the Parliament's legislative powers by its participation in and

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[482] Statements were made on 10 May 1995 and 25 February 1997: see Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 1999, p 11436 (Daryl Williams, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 5 June 2000, p 14541 (Chris Ellison, Special Minister of State). See also Legal and Constitutional Affairs Committee, Senate, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1996) pp 90-91.

[483] See *Administrative Decisions (Effect of International Instruments) Bill 1999* (Cth); *Administrative Decisions (Effect of International Instruments) Bill 1997* (Cth); *Administrative Decisions (Effect of International Instruments) Bill 1995* (Cth). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 1999, p 11436 (Daryl Williams, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 5 June 2000, p 14541 (Chris Ellison, Special Minister of State). Notably each of the Bills lapsed when the Parliament was prorogued in 2001, 1998 and 1996 respectively.

[484] See Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 1999, p 11436 (Daryl Williams, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 5 June 2000, p 14541 (Chris Ellison, Special Minister of State); Commonwealth, *Parliamentary Debates*, House of Representatives, 18 June 1997, p 5545 (Daryl Williams, Attorney-General and Minister for Justice); Commonwealth, *Parliamentary Debates*, House of Representatives, 21 September 1995, p 1435 (Duncan Kerr, Minister for Justice); Commonwealth, *Parliamentary Debates*, Senate, 27 September 1995, p 1491 (Robert Faulkner, Minister for the Environment, Sport and Territories). See also Legal and Constitutional Affairs Committee, Senate, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1996) pp 90-94 and the references therein.

[485] For the reasoning see Legal and Constitutional Legislation Committee, Senate, *Administrative Decisions (Effect of International Instruments) Bill 1997* (1997) pp 27-37 (minority reports).

[486] See *Administrative Decisions (Effect of International Instruments) Bill 1999* (Cth) cl 5; *Administrative Decisions (Effect of International Instruments) Bill 1997* (Cth) cl 5.

[487] See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 31-34 (McHugh and Gummow JJ), 37-39 (Hayne J), 45-48 (Callinan J).

[488] See Bruce Dyer, 'Legitimate Expectations in Procedural Fairness After *Lam*' in Matthew Groves (ed), *Law and Government in Australia* (2005) pp 184-212 and the references therein

[489] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 (McHugh and Gummow JJ).

[490] See Department of Foreign Affairs and Trade, *Review of the Treaty-making Process* (1999). See also Department of Foreign Affairs and Trade, *Signed, Sealed and Delivered – Treaties and Treaty Making: An Official's Handbook* (3rd ed, 2003); Department of the Prime Minister and Cabinet, *Principles and Procedures for Commonwealth-State Consultation on Treaties* (1996).

adoption of practices from the international sphere. The primary constitutional authority is the *Constitution* s 51(xxix):

> The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to … (xxix) external affairs.

The minimum requirement appears to be some form of international obligation affecting Australia's dealings with the broader international community.[491] The cases provide some further indication that this is potentially a very broad authority and that it extends to the consequences of acts of foreign states affecting Australia,[492] matters that are territorially outside Australia,[493] and treaties and conventions addressing some form of 'international concern'.[494] The primary concern in the decided cases has, however, been about the likely limits on this power and the potential for the Executive to enter into obligations that then attract the capacity for the Parliament to legislate in areas that were previously outside the scope of the *Constitution* – in short, the concern that the 'matters upon which there might be valid Commonwealth legislation [is] limited only by the capacity of the executive to conclude a treaty upon them'.[495] There seems little doubt that the Parliament can now legislate[496] in respect of customary international law[497] and almost every treaty or convention entered into in good faith by the Executive[498] on *any* subject,[499] to the extent the legislation is 'incidental to carrying out

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[491] See *XYZ v Commonwealth* (2006) 227 CLR 532 at 539 (Gleeson CJ), 546-547 (Gummow, Hayne and Crennan JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 560-561 (Brennan J), 604-605 (Deane J); *Richardson v Forestry Commission* (1988) 164 CLR 261 at 322 (Dawson J); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 131-132 (Mason J), 170-172 (Murphy J), 220 and 222 (Brennan J), 258-259 (Deane J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 234 (Mason J), 258 (Brennan J); and so on.

[492] See, for examples, *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351 at 380 (Mason J), 385 (Murphy J), 438 (Deane J). See also *Hunt v BP Exploration Co (Libya) Ltd* (1980) 144 CLR 565 at 575 (Murphy J).

[493] See, for examples, *XYZ v Commonwealth* (2006) 227 CLR 532 at 539 (Gleeson CJ), 546-547 (Gummow, Hayne and Crennan JJ); *Victoria v Commonwealth* (1996) 187 CLR 416 at 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Horta v Commonwealth* (1994) 181 CLR 183 at 193-194 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 528-531 (Mason CJ), 549-550 (Brennan J), 599-605 (Deane J), 632 (Dawson J), 652-654 (Toohey J), 696 (Gaudron J), 712-714 (McHugh J); *New South Wales v Commonwealth* (1975) 135 CLR 337 at 360 (Barwick CJ), 470-471 (Mason J), 497 (Jacobs J), 503-504 (Murphy J); and so on.

[494] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 216-217 (Stephen J), 229 (Mason J), 240-241 (Murphy J), 258 (Brennan J), ; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 131-132 (Mason J), 170-172 (Murphy J), 220 and 222 (Brennan J), 258-259 (Deane J); *Richardson v Forestry Commission* (1988) 164 CLR 261 at 322 (Dawson J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 560-561 (Brennan J), 604-605 (Deane J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 687 (Evatt and McTiernan JJ).

[495] See, for examples, *Victoria v Commonwealth* (1996) 187 CLR 416 at 567 (Dawson J). See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 194-195, 198 and 200 (Gibbs CJ), 213 (Stephen J), 243, 248 and 251-252 (Aickin J), 242 and 248-249 (Wilson JJ); *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 at 152-153 (Windeyer J); *Richardson v Forestry Commission* (1988) 164 CLR 261 at 321 (Dawson J); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 99-100 (Gibbs CJ), 126 (Mason J), 196-198 (Wilson J), 302-305 (Dawson J).

[496] Notably, this appears to be based on the Legislature's judgment that 'The content of the obligation is open to debate … Put positively, it was open to the Parliament to conclude that qualifying common law rights of action against strikers will fulfil, at least in part, Australia's obligation to provide a right to strike within the terms of the Covenant': see *Victoria v Commonwealth* (1996) 187 CLR 416 at 546 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See also *Richardson v Forestry Commission* (1988) 164 CLR 261 at 295-296 (Mason CJ and Brennan J).

[497] See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 220 (Stephen J), 234 (Mason J); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 131 (Mason J), 171 (Murphy J), 222 (Brennan J), 258 (Deane J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 560-561 (Brennan J).

[498] The limits appear to be to treaties or conventions that cannot be practically put into effect, such as treaties or conventions 'expressed in terms of aspiration (for example, "to promote full employment") cannot support a law which adopts one of a variety of possibly contradictory ways that might be selected to fulfil the aspiration': *Victoria v Commonwealth* (1996) 187 CLR 416 at 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[499] See *Victoria v Commonwealth* (1996) 187 CLR 416 at 482-485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Richardson v Forestry Commission* (1988) 164 CLR 261 at 298 (Wilson J), 322 (Dawson J); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 124-125 (Mason J), 170-171 (Murphy J), 218-219 (Brennan J), 258 (Deane J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 231 (Mason J), 240 (Murphy J), 258 (Brennan J); *New South Wales v Commonwealth* (1975) 135 CLR 337 at 360 (Barwick CJ), 470-471 (Mason J), 497 (Jacobs J), 502-503 (Murphy J); *Airlines of NSW Pty Ltd v New*

and giving effect to the convention' or within 'the terms of the [treaty or] convention, and upon the rights and duties it confers and imposes'.[500] Beyond this the problem arose in *R v Burgess; Ex parte Henry* where Justices Evatt and McTiernan went further, and said:

> But it is not to be assumed that the legislative power over 'external affairs' is limited to the execution of treaties or conventions … the Parliament may well be deemed competent to legislate for the carrying out of 'recommendations' as well as the 'draft international conventions' resolved upon by the International Labour Organization or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations. The power is a great and important one.[501]

Thus, the uncertainty remains as to what sort of relationships, and their nature and scope, in addition to treaties and convention that might 'enliven' the s 51(xxix) external affairs power? The decided cases provide some insight into the potentially broad potential of this power for the Executive.

Commonwealth v Tasmania (1983) 158 CLR 1

In *Commonwealth v Tasmania* the State of Tasmania proposed the construction of a dam, a power station and associated works under the *Gordon River Hydro-Electric Power Development Act 1982* (Tas).[502] Meanwhile the Commonwealth sought to stop the dam construction without a Commonwealth Minister's consent in conformity with its commitment to the United Nations' *Convention for the Protection of the World Cultural and Natural Heritage* as articulated in the *World Heritage (Western Tasmania Wilderness) Regulations 1983* (Cth) made under the *National Parks and Wildlife Conservation Act 1975* (Cth) and the *World Heritage Properties Conservation Act 1983* (Cth).[503] One of the many issues in contention was whether the *National Parks and Wildlife Conservation Act 1975* (Cth) and the *World Heritage Properties Conservation Act 1983* (Cth) were validly enacted under the s 51(xxix) external affairs power.[504] The High Court majority found the provisions relying on the s 51(xxix) external affairs power were variously validly enacted where they were both the subject of international treaty and conformed to the treaty and carrying its terms into effect.[505]

Justice Mason considered that entering into a treaty or convention was itself sufficient to attract the s 51(xxix) external affairs power to the extent of the treaty or convention's provisions.[506] He went

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South Wales (No 2) (1965) 113 CLR 54 at 136 (Menzies J); *Ffrost v Stevenson* (1937) 58 CLR 528 at 599 (Evatt J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 640 (Latham CJ), 680-681 (Evatt and McTiernan JJ).

[500] *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 673 (Dixon J), 688 (Evatt and McTiernan JJ) respectively. See also *Victoria v Commonwealth* (1996) 187 CLR 416 at 486-488 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 103-106 (Gibbs CJ), 130-131 (Mason J), 172 (Murphy J), 231 and 232 (Brennan J), 257, 259-260, 267 and 278 (Deane J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 189 (Gibbs CJ), 221 (Stephen J), 235 (Mason J), 241-242 (Murphy J), 260-261 (Brennan J); *Richardson v Forestry Commission* (1988) 164 CLR 261 at 289 (Mason CJ and Brennan J), 303-304 (Wilson J), 311-313 and 319-320 (Deane J), 324 (Dawson J), 336 (Toohey J), 342 (Gaudron J); *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 at 86 (Barwick CJ), 102 (McTiernan J), 118 (Kitto J), 126 (Taylor J), 136 (Menzies J), 152-153 (Windeyer J), 166-167 (Owen J); *R v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634 at 644 (Rich J), 647-648 (Starke J), 655-656 (Evatt J). Notably, questions of proportionality may arise about whether the legislation is 'appropriate and adapted' to achieving its purpose: see *Victoria v Commonwealth* (1996) 187 CLR 416 at 486-487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Richardson v Forestry Commission* (1988) 164 CLR 261 at 311-312 (Deane J). See also Elisa Arcioni, 'Politics, Police and Proportionality – An Opportunity to Explore the *Lange* Test: *Coleman v Power*' (2003) 25 *Sydney Law Review* 379 at 385-388.

[501] *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 687 (Evatt and McTiernan JJ).

[502] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 59 (Gibbs CJ), 160 (Murphy J), 205-206 (Brennan J), 250 (Deane J).

[503] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 60-63 (Gibbs CJ), 160-161 (Murphy J), 207 (Brennan J), 250 (Deane J).

[504] See *Commonwealth v Tasmania* (1983) 158 CLR 1 at 96-97 (Gibbs CJ), 120 (Mason J), 161 and 170 (Murphy J), 183-184 (Wilson J), 208 (Brennan J), 250 and 253 (Deane J), 295 (Dawson J).

[505] See *Commonwealth v Tasmania* (1983) 158 CLR 1 at 138, 141, 146 and 160 (Mason J), 178-179 and 183 (Murphy J), 235 and 239 (Brennan J), 265-268 (Deane J).

[506] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 121-126 (Mason J).

further to conclude that putting the treaty or convention into effect would also attract the power.[507] But he expressly rejected the proposition that:

> … once Australia enters into a treaty Parliament may legislate with respect to the subject-matter of the treaty as if that subject-matter were a new and independent head of Commonwealth legislative power. The law must conform to the treaty and carry its provisions into effect.[508]

Justice Murphy considered that the power extended broadly beyond the treaty or convention and putting into effect[509] and included:

> To be a law with respect to external affairs it is sufficient that it: (a) implements any international law, or (b) implements any treaty or convention whether general (multilateral) or particular, or (c) implements any recommendation or request of the United Nations organization or subsidiary organizations such as the World Health Organization, the United Nations Education, Scientific and Cultural Organization, the Food and Agriculture Organization or the International Labour Organization, or (d) fosters (or inhibits) relations between Australia or political entities, bodies or persons within Australia and other nation States, entities, groups or persons external to Australia, or (e) deals with circumstances or things outside Australia, or (f) deals with circumstances or things inside Australia of international concern … [and] … the legislative power will extend to laws which could reasonably be regarded as appropriate for dealing with that circumstance.[510]

Justice Brennan considered that a treaty or convention was sufficient to attract the external affairs power to the extent of the treaty or convention's provisions but did not address the broader question of matters beyond a treaty or convention.[511] Meanwhile Justice Deane stated the same propositions[512] and went further saying:

> The establishment and protection of the means of conducting international relations, the negotiation, making and honouring (by observing and carrying into effect) of international agreements, and the assertion of rights and the discharge of obligations under both treaties and customary international law lie at the centre of a nation's external affairs and of the power which s 51(xxix) confers. They do not, however, cover the whole field of 'external affairs' or exhaust the subject-matter of the legislative power. The full scope of the power is best left for determination on a case by case basis … It is, however, relevant for present purposes to note that the responsible conduct of external affairs in today's world will, on occasion, require observance of the spirit as well as the letter of international agreements, compliance with recommendations of international agencies and pursuit of international objectives which cannot be measured in terms of binding obligation. This was recognized by Evatt and McTiernan JJ in *Burgess' Case* when … they commented that 'it is not to be assumed that the legislative power over "external affairs" is limited to the execution of treaties or conventions' and illustrated the comment by adding that 'the Parliament may well be deemed competent to legislate for the carrying out of "recommendations" as well as the "draft international conventions" resolved upon by the International Labour Organization or of other international recommendations or requests upon other subject-matters of concern to Australia as a member of the family of nations'.
>
> Circumstances could well exist in which a law which procured or ensured observance within Australia of the spirit of a treaty or compliance with an international recommendation or pursuit of an international objective would properly be characterized as a law with respect to external affairs, notwithstanding the absence of any potential breach of defined international obligations or of the letter of international law.[513]

Victoria v Commonwealth (1996) 187 CLR 416

Thus, while *Commonwealth v Tasmania (Tasmanian Dams case)* did not resolve the matter, there was some relevant commentary suggesting the external affairs power extended beyond completed

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[507] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 130-131 (Mason J) citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 658 (Dixon J), 688 (Evatt and McTiernan JJ); *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 at 86 (Barwick CJ), 141 (Menzies J); *Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418 at 437 (Kitto J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 233 (Mason J), 258-261 (Brennan J).

[508] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 131 (Mason J).

[509] See *Commonwealth v Tasmania* (1983) 158 CLR 1 at 170 (Murphy J).

[510] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 170-171 (Murphy J).

[511] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 218-219 (Brennan J).

[512] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 258 and 259-260 (Deane J).

[513] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 258-259 (Deane J).

treaties and conventions. The matter was again canvassed in *Victoria v Commonwealth (Industrial Relations case)* where various States brought proceedings against the Commonwealth seeking declarations that certain provisions of the *Industrial Relations Act 1988* (Cth) were invalid.[514] The *Industrial Relations Act 1988* (Cth) purported to bind the States and was amended by the *Industrial Relations Reform Act 1993* (Cth) and the *Industrial Relations Amendment Act (No 2) 1994* (Cth) to allow for the imposition of obligations on employers about minimum wages, equal pay, termination of employment, discrimination and family leave, collective bargaining and the right to strike.[515] The Commonwealth asserted, in part, that the legislation was enacted under the external affairs power in the *Constitution* s 51(xxix) and addressed matters the subject of Conventions adopted by the General Conference of the International Labour Organisation (ILO) that had been ratified by Australia, matters the subject of Recommendations adopted by the General Conference of the ILO, and matters of customary international law.[516] The plaintiffs contended that:[517]

> … the power to legislate with respect to external affairs does not extend to the implementation of treaty obligations unless the subject matter of the treaty is one of international concern. According to their argument, the ILO Conventions and Recommendations on which the provisions in question are based are not concerned with matters of that kind. As well, they argue that the ILO Conventions and Recommendations do not impose obligations or, if they do, the provisions in question are not capable of being viewed as appropriate or adapted to their implementation. In some instances, they say, the provisions are simply not directed to any relevant external affair.[518]

The significance of the ILO Conventions was that by 'ratification' of the Convention the Commonwealth had committed to 'then "take such action as may be necessary to make effective the provisions" of that Convention', meanwhile a 'Recommendation' only committed the Commonwealth 'to bring Recommendations before the authorities which are competent to legislate or take other action to implement them'.[519] Where there was ratification then a complaints and investigation scheme existed that provided final determinative jurisdiction to the International Court of Justice.[520] Failure to comply with the outcomes of the complaints and investigation scheme then provided that the 'Governing Body [of the ILO] may recommend to the General Conference "such action as it may deem wise and expedient to secure compliance"'.[521] In effect the ILO Conventions empowered and international governmental entity with authority to impose sanctions in some form on Australia.

The High Court joint judgment of Chief Justice Brennan, and Justices Toohey, Gaudron, McHugh and Gummow distinguished between the operation of the relevant executive powers and the legislative powers:

> The powers of the Commonwealth in relation to external affairs are of two kinds: executive and legislative. The executive power conferred by s 61 of the *Constitution* is of the same character as, and is no narrower in scope than, the prerogative power of the Crown in relation to the same subject. The executive power extends to the signing and ratification of treaties. The legislative power conferred by s 51(xxix) on the Parliament is to be distinguished from the executive power. The former extends to the enactment of laws implementing the provisions of treaties entered into by the Executive so as to bind the Commonwealth.[522]

The division between the powers was:

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[514] *Victoria v Commonwealth* (1996) 187 CLR 416 at 474 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[515] *Victoria v Commonwealth* (1996) 187 CLR 416 at 474 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[516] *Victoria v Commonwealth* (1996) 187 CLR 416 at 474-475 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[517] Significantly, the Commonwealth legislation was also entering into an area of legislation that had previously been the preserve of the States: *Victoria v Commonwealth* (1996) 187 CLR 416 at 484-485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), 564-566 (Dawson J).
[518] *Victoria v Commonwealth* (1996) 187 CLR 416 at 475 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[519] *Victoria v Commonwealth* (1996) 187 CLR 416 at 490 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[520] *Victoria v Commonwealth* (1996) 187 CLR 416 at 490 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[521] *Victoria v Commonwealth* (1996) 187 CLR 416 at 490 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[522] *Victoria v Commonwealth* (1996) 187 CLR 416 at 475 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 253 (Brennan J).

> Where, as in the present case, the Executive ratifies a Convention which calls for action affecting powers and relationships governed by the domestic legal order, legislation is needed to implement the Convention. The question then arises whether the law is supported by the legislative power with respect to external affairs. The spare text of s 51(xxix) must be construed to ascertain its scope.[523] s

The 'spare text' was interpreted to mean, according to the doctrine articulated by Justice Dawson in *Polyukhovich v Commonwealth*,[524] and 'now … representing the view of the Court'[525], as:

> '[T]he power extends to places, persons, matters or things physically external to Australia. The word "affairs" is imprecise, but is wide enough to cover places, persons, matters or things. The word "external" is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase "external affairs"'.[526]

The joint reasons then cite Justices Evatt and McTiernan in *R v Burgess; Ex parte Henry* for the proposition:

> 'But it is not to be assumed that the legislative power over "external affairs" is limited to the execution of treaties or conventions; and ... the Parliament may well be deemed competent to legislate for the carrying out of "recommendations" as well as the "draft international conventions" resolved upon by the International Labour Organisation or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations'.[527]

The result for the joint judgment was to find that the laws based in the ratified Conventions[528] and the Recommendations[529] were authorised by the s 51(xxix) external affairs power.[530] While supporting the conclusions of the joint judgment, because he felt bound by previous authority,[531] Justice Dawson articulated his perspective that a law with an 'entirely domestic operation' could not be within the scope of the s 51(xxix) external affairs power 'merely because it implements a treaty or is upon a subject matter which is of international concern'.[532] The decision in the joint judgment in this case, however, is more nuanced. In finding that the laws based in the ratified Conventions and the Recommendations were authorised by the s 51(xxix) external affairs power, the joint judgment considered in each instance that the Recommendations were not the primary authority:[533]

(a) *Equal remuneration* – The sections of the *Industrial Relations Act 1988* (Cth) that implemented the Recommendation(s) were 'supported under s 51(xxix) if, *but only if*, the terms of these

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523 *Victoria v Commonwealth* (1996) 187 CLR 416 at 482 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

524 See *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 528-531 (Mason CJ), 599-603 (Deane J), 595-596 (Gaudron J), 632 (Dawson J), 712-714 (McHugh J).

525 *Victoria v Commonwealth* (1996) 187 CLR 416 at 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

526 *Victoria v Commonwealth* (1996) 187 CLR 416 at 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) citing *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 632 (Dawson J).

527 *Victoria v Commonwealth* (1996) 187 CLR 416 at 483 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 687 (Evatt and McTiernan JJ).

528 *Victoria v Commonwealth* (1996) 187 CLR 416 at 496 (minimum wages), 509 (equal remuneration), 518 (termination of employment), 524 (parental leave), 532 (discrimination, except against 'mental disability') (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

529 *Victoria v Commonwealth* (1996) 187 CLR 416 at 509 (equal remuneration where the Recommendation was reasonably regarded as appropriate and adapted to giving effect to the terms of a Convention), 524 (parental leave confirms and reinforces the references in the Convention) (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

530 *Victoria v Commonwealth* (1996) 187 CLR 416 at 496 (minimum wages), 518 (termination of employment), 524 (parental leave), 532 (discrimination, except against 'mental disability') (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

531 *Victoria v Commonwealth* (1996) 187 CLR 416 at 563 (Dawson J).

532 *Victoria v Commonwealth* (1996) 187 CLR 416 at 569 (Dawson J).

533 Notably, the *Industrial Relations Act 1988* (Cth) s 170CA(1) sought to give effect to a Convention and Recommendation, the joint judgment finding the impugned provisions 'enlivens' by s 51(xxix) external affairs power to the extent of the Convention and made no reference to the Recommendation: *Victoria v Commonwealth* (1996) 187 CLR 416 at 512 and 518 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

Recommendations themselves can reasonably be regarded as appropriate and adapted to giving effect to the terms of the Conventions to which they relate' (emphasis added).[534] In other words, the reliance on the Recommendation was merely one step removed from implementing the content of the Convention. This is not strong authority for the proposition that a Recommendation 'enlivens' the s 51(xxix) external affairs power.

(b) *Parental leave* – The sections of the *Industrial Relations Act 1988* (Cth) that implemented the Convention were within the terms of the Convention obligation and the Recommendation merely 'confirms the appropriateness of a law relating to parental leave to fulfilling Australia's obligations under the [Convention]'.[535] Again, this is not strong authority for the proposition that a Recommendation 'enlivens' the s 51(xxix) external affairs power.

Thus, the scope of 'international concern' that might 'enliven' the s 51(xxix) external affairs power remains open and the early observations of Justices Evatt and McTiernan in *R v Burgess; Ex parte Henry* appear to have some weight:

> … a consequence of the closer connection between the nations of the world (which has been partly brought about by the modern revolutions in communication) and of the recognition by the nations of a common interest in many matters affecting the social welfare of their peoples and of the necessity of co-operation among them in dealing with such matters, that it is no longer possible to assert that there is any subject matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute or international agreement.[536]

XYZ v Commonwealth (2006) 227 CLR 532

Most recently in *XYZ v Commonwealth* Justices Kirby, Callinan and Heydon expressed reservations about matters of 'international concern' being relevant in 'enlivening' the s 51(xxix) external affairs power,[537] in part, because of the uncertain limits to international concerns.[538] In this case the validity of the *Crimes Act 1914* (Cth) prohibiting a person, while outside Australia, from engaging in sexual intercourse with a person under sixteen was challenged.[539] Significantly, the decisions did not rely on there being an 'international concern'.[540] Chief Justice Gleeson and Justices Gummow, Hayne and Crennan confirmed the proposition, in the words of the Chief Justice, that 'the external affairs power covers, but is not limited to, the matter of Australia's relations with other countries [and i]t also includes a power to make laws with respect to places, persons, matters or things outside the geographical limits of, that is, external to, Australia'.[541] For Justice Kirby the law concerned 'the relations of the Commonwealth with nation states other than Australia' (the 'Australian international relationships view'), and this was sufficient to enliven the s 51(xxix) external affairs power.[542] Justices Callinan and Heydon in dissented accepted the similar proposition that 'the expression "external affairs" refers to relationships between Australia and other countries or international organisations',[543] but that crime was not about a relationship.[544] Importantly, Justices Callinan and

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534 *Victoria v Commonwealth* (1996) 187 CLR 416 at 509 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
535 *Victoria v Commonwealth* (1996) 187 CLR 416 at 524 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
536 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 680-681 (Evatt and McTiernan JJ). See also *Victoria v Commonwealth* (1996) 187 CLR 416 at 483-484 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
537 *XYZ v Commonwealth* (2006) 227 CLR 532 at 574-575 (Kirby J), 612 (Callinan and Heydon JJ).
538 *XYZ v Commonwealth* (2006) 227 CLR 532 at 574-575 (Kirby J), 610 (Callinan and Heydon JJ)
539 *XYZ v Commonwealth* (2006) 227 CLR 532 at 535 (Gleeson CJ), 544-545 (Gummow, Hayne and Crennan JJ), 553 (Kirby J), 582-583 (Callinan and Heydon JJ).
540 See *XYZ v Commonwealth* (2006) 227 CLR 532 at 543 (Gleeson CJ), 552-553 (Gummow, Hayne and Crennan JJ), 575 (Kirby J), 582 (Callinan and Heydon JJ).
541 *XYZ v Commonwealth* (2006) 227 CLR 532 at 539 (Gleeson CJ), 546-547 (Gummow, Hayne and Crennan JJ) both citing *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 528 (Mason CJ), 602 (Deane J), 632 (Dawson J), 696 (Gaudron J), 714 (McHugh J) and *Victoria v Commonwealth* (1996) 187 CLR 416 at 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
542 *XYZ v Commonwealth* (2006) 227 CLR 532 at 578 (Kirby J).
543 *XYZ v Commonwealth* (2006) 227 CLR 532 at 591 and 593 (Callinan and Heydon JJ).
544 See *XYZ v Commonwealth* (2006) 227 CLR 532 at 604-606 (Callinan and Heydon JJ).

Heydon rejected the territoriality approach (the 'geographic externality view') favoured by Chief Justice Gleeson and Justices Gummow, Hayne and Crennan.[545] The result was that Chief Justice Gleeson and Justices Gummow, Kirby, Hayne and Crennan found the law was valid under the s 51(xxix) external affairs power.[546]

Pape v Commissioner of Taxation (2009) 238 CLR 1

Then in *Pape v Commissioner of Taxation* (see also ¶5.4.3, p 131; ¶7.6.1, p 222; ¶7.6.3, p 231) the High Court considered the validity of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) as part of a fiscal stimulus in response to a global financial crisis.[547] There a part of the Commonwealth's argument was that the legislation was within power as a response to the global financial crisis.[548] The only justices directly addressing the substance of the s 51(xxix) power were Justices Hayne, Heydon and Kiefel.[549]

Justices Hayne and Kiefel rejected both the Commonwealth's arguments that the s 51(xxix) external affairs power was enlivened because the impugned law was 'an appropriate and adapted response to what is an external matter or thing, namely, the global financial crisis' (the 'geographic externality view' resounding the *Polyukhovich v Commonwealth* decision and Chief Justice Gleeson and Justices Gummow, Hayne and Crennan in *XYZ v Commonwealth*) and that 'the fiscal stimulus (including the provision of the tax bonus) implements an international agreement or understanding' (the 'Australian international relationships view' resounding Justices Kirby, Callinan and Heydon in *XYZ v Commonwealth*).[550] The 'geographic externality view' was rejected because the impugned law 'is not a law with respect to any matter or thing external to Australia', citing Justices Gummow, Hayne and Crennan in *XYZ v Commonwealth*.[551] The 'Australian international relationships view' was also rejected because there was not a sufficient agreement or understanding 'shown that Australia has undertaken any international *obligation* sufficient to [enliven] the external affairs power' (emphasis added).[552] In this case the international relationships were said to be declarations from a world summit and recommendations from an international organisation to which Australia was a participant.[553] As none of these imposed 'obligations' they were not sufficient to be implementing an international agreement or understanding.[554]

Justice Heydon also rejected both the 'geographic externality view' and the 'Australian international relationships view'.[555] Like Justices Hayne and Kiefel, Justice Heydon considered the impugned law related to domestic matters and not international matters as the origins of the crisis were external to Australia.[556] In rejecting the 'geographic externality view' Justice Heydon stated:

> If legislation is to be validated by recourse to a treaty (or international commitment) that treaty or commitment must set out a regime defined with "sufficient specificity to direct the general course to be taken" by the relevant states. The treaty or commitment need not have the precision necessary to establish a legally enforceable agreement at common law, but it must avoid excessive generality (footnotes omitted).[557]

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[545] *XYZ v Commonwealth* (2006) 227 CLR 532 at 604 (Callinan and Heydon JJ).
[546] *XYZ v Commonwealth* (2006) 227 CLR 532 at 544 (Gleeson CJ), 553 (Gummow, Hayne and Crennan JJ), 582 (Kirby J).
[547] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 32 (French CJ), 66-67 (Gummow, Crennan and Bell JJ), 95 (Hayne and Kiefel JJ).
[548] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 33 (French CJ), 94 (Gummow, Crennan and Bell JJ), 99 (Hayne and Kiefel JJ), 157-168 (Heydon J).
[549] The other justices did not need to address the power in reaching their conclusions: see *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 64 (French CJ), 94 (Gummow, Crennan and Bell JJ).
[550] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 126 (Hayne and Kiefel JJ).
[551] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 126 (Hayne and Kiefel JJ).
[552] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 126 (Hayne and Kiefel JJ).
[553] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 126-128 (Hayne and Kiefel JJ).
[554] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 128 (Hayne and Kiefel JJ).
[555] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 157-168 (Heydon J).
[556] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 159-160 (Heydon J).
[557] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 162 (Heydon J).

He also rejected the Commonwealth's related argument that some 'comity' with foreign governments was sufficient grounds to make laws.[558] Significantly Justice Heydon also rejected the 'international concern' arguments restating his (with Justice Callinan) position in *XYZ v Commonwealth*.[559]

The consequence is that there is now a significant influence of international bodies such as the United Nations, the Organisation of Economic Co-operation and Development, the World Bank, the World Trade Organisation, and so on, on the conduct of government in Australia. While these various international bodies can provide a basis for domestic law making, the various decisions suggest that a 'mere 'international concern' may not be sufficient.

5.9.3 The Executive ceding the Parliament's authority

In exercising the Executive's prerogative powers that acquire rights and obligations in the international sphere (including the making and ratification of treaties), a particular concern has been that in participating in some of these forums the Executive has ceded some of the Parliament's authority over the Executive to these other organisations.[560] While this may not limit the Parliament's powers to make laws, the Executive's entering into obligations means that Parliament's actions in making some laws can lead to various sanctions. For example, the Executive entered into the World Trade Organisation's TRIPS as part of the *Marrakech Agreement Establishing the World Trade Organisation*.[561] The TRIPS agreement sets out mandatory minimum standards for various intellectual property measures that the Members of the World Trade Organisation agreed to implement:[562]

> Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.[563]

The sting in TRIPS was the mandatory requirement that:

> Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.[564]

And the mandatory dispute settlement procedures:

> The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.[565]

The GATT Dispute Settlement Understanding[566] establishes a tribunal to resolve disputes and provides for compensation and retaliatory trade measures where 'the [tribunal's] recommendations

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[558] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 161-162 (Heydon J).
[559] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 161 (Heydon J).
[560] See, for example, See also Legal and Constitutional Affairs Committee, Senate, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1996) pp 240-247.
[561] *Marrakech Agreement Establishing the World Trade Organisation* [1995] *Australian Treaty Series* 8, Annex 1C (*Agreement on Trade Related Aspects of Intellectual Property Rights*).
[562] *Marrakech Agreement Establishing the World Trade Organisation* [1995] *Australian Treaty Series* 8, Annex 1C, Arts 9-14 (copyright and related rights), 15-21 (trademarks), 22-24 (geographical indications), 25-26 (industrial designs), 27-34 (patents), 35-38 (layout-designs (topographies) of integrated circuits), 39 (protection of undisclosed information), 40 (Anti-Competitive Practices in Contractual Licences).
[563] *Marrakech Agreement Establishing the World Trade Organisation* [1995] *Australian Treaty Series* 8, Annex 1C, Art 1(1).
[564] *Marrakech Agreement Establishing the World Trade Organisation* [1995] *Australian Treaty Series* 8, Annex 1C, Art 41(1).
[565] *Marrakech Agreement Establishing the World Trade Organisation* [1995] *Australian Treaty Series* 8, Annex 1C, Art 64(1).

and rulings are not implemented within a reasonable period of time'.[567] These are potentially unilateral actions outside the ambit of Parliament's authority and directly affecting the Parliament's authority to make laws where those laws might contravene the minimum standards expected under TRIPS.[568] Thus, a failure of the Parliament to implement patent laws consistent with TRIPS would have expose Australia to possible unilateral trade sanctions, irrespective of the Parliament's perspectives about those patent standards.

To address some of these kinds of concerns[569] the Executive has developed a treaty making process *before* Australia becomes a party to a treaty.[570] While there seems little doubt that the Parliament can limit the Executive's powers to enter into treaties through legislation,[571] the Parliament cannot take over the power to enter into treaties.[572] The negotiation of an agreement about the treaty making process therefore provides a compromise by the Executive in favour of the Parliament, and now includes the following elements:[573]

(a) *Tabling of Treaties* – That treaties Australia intends to join are tabled in Parliament for a minimum of 15 sitting days before the Executive takes binding action with shorter tabling periods in urgent circumstances and for longer periods for complex matters, the time to allow adequate Parliamentary and public scrutiny and the need for timely treaty action.[574]

(b) *National Interest Analyses* – That tabled treaties be accompanied by a National Interest Analysis setting out (or to 'demonstrate') 'the reasons for the Government's decision that Australia should enter into legally binding obligations under the treaty' and so 'that no treaty should be ratified without an analysis of the impact the treaty would have on Australia'.[575]

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[566] *Marrakech Agreement Establishing the World Trade Organisation* [1995] *Australian Treaty Series* 8, Annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*).

[567] *Marrakech Agreement Establishing the World Trade Organisation* [1995] *Australian Treaty Series* 8, Annex 2, Art 22.

[568] These measures are considered within the broader policy debates following further Executive agreement making: see Charles Lawson and Catherine Pickering, '"TRIPs-Plus" Patent Privileges – An Intellectual Property "Cargo Cult" in Australia' (2004) 22 *Prometheus* 355.

[569] See, for examples, Minister for Foreign Affairs and Attorney-General, *Government Announces Reform of Treaty-Making*, Joint Statement (1996); Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1996, pp 231-235 (Alexander Downer, Minister for Foreign Affairs); Commonwealth, *Parliamentary Debates*, Senate, 2 May 1996, pp 217-228 (Robert Hill, Leader of the Government in the Senate); Legal and Constitutional References Committee, Senate, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995) pp 229-241; Council of Australian Governments, *Position Paper on Reform of the Treaties Process* (1995). See also Joint Standing Committee on Treaties, *Treaty Scrutiny: A Ten Year Review*, Report No 78 (2006) p 3; Council of Australian Governments, *Communiqué*, 14 June 1996; Susan Downing, *Treaty-Making Options for Australia*, Parliamentary Research Service Current Issues Brief (1996).

[570] See Department of Foreign Affairs and Trade, *Review of the Treaty-Making Process* (1999); Minister for Foreign Affairs and Attorney-General, *Government Announces Reform of Treaty-Making*, Joint Statement (1996).

[571] See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 237-238 (Murphy J); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 406 (Jacobs J); *Barton v Commonwealth* (1974) 131 CLR 477 at 491 (McTiernan and Menzies JJ), 501 (Mason J). See also Legal and Constitutional References Committee, Senate, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995) pp 86-88.

[572] See Max Spry, *The Executive Power of the Commonwealth: Its Scope and Limits*, Parliamentary Research Paper No 28 1995-1996 (1996) pp 19-20.

[573] See generally Joint Standing Committee on Treaties, *Treaty Scrutiny: A Ten Year Review* (2006) pp 21-36; Department of Foreign Affairs and Trade, *Review of the Treaty-Making Process* (1999); Minister for Foreign Affairs and Attorney-General, *Government Announces Reform of Treaty-Making*, Joint Statement (1996); Legal and Constitutional References Committee, Senate, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995). See also Council of Australian Governments, *Principles and Procedures for Commonwealth-State-Territory Consultation on Treaties* (1996).

[574] See Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1996, pp 232-233 (Alexander Downer, Minister for Foreign Affairs); Commonwealth, *Parliamentary Debates*, Senate, 2 May 1996, p 226 (Robert Hill, Leader of the Government in the Senate).

[575] See Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1996, p 233 (Alexander Downer, Minister for Foreign Affairs); Commonwealth, *Parliamentary Debates*, Senate, 2 May 1996, pp 226-227 (Robert Hill, Leader of the Government in the Senate).

(c) *Parliamentary Joint Standing Committee on Treaties* – That the Joint Parliamentary Committee on Treaties (JSCOT) 'consider tabled treaties, their National Interest Analyses and any other question relating to a treaty or international instrument that is referred to it by either House of Parliament or a Minister' so as to 'provide detailed scrutiny and examination of those treaties that are of particular interest to Australians'.[576]

(d) *Treaties Council* – That there be established a Treaties Council 'as an adjunct to the Council of Australian Governments' with 'an advisory function'.[577]

(e) *Treaties Information Database* – That there be a database of treaties made available and 'designed to make it easy for all persons and groups with an interest in treaty information to obtain it free of charge'.[578] A treaties database, the Australian Treaties Library is available at www.austlii.edu.au/au/ other/dfat and the Australian Treaties Database is available at http://www.dfat.gov.au/treaties/index.html.

The roles of these elemental reforms were reviewed in 2006 and the following were identified as areas of concern: 'the adequacy of Commonwealth consultation with the States and Territories'; 'the Treaties Council'; and 'the role of JSCOT in the Parliamentary scrutiny of treaties':[579]

> The Committee acknowledges that there are shortcomings evident in the treaty scrutiny process. However, it is also apparent that the 1996 Reforms have contributed to a more transparent and involved process for the Commonwealth Parliament, States and Territory governments, organisations and industry groups as well as individuals.[580]

[576] See Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1996, p 233 (Alexander Downer, Minister for Foreign Affairs); Commonwealth, *Parliamentary Debates*, Senate, 2 May 1996, p 227 (Robert Hill, Leader of the Government in the Senate).
[577] See Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1996, p 233 (Alexander Downer, Minister for Foreign Affairs); Commonwealth, *Parliamentary Debates*, Senate, 2 May 1996, p 227 (Robert Hill, Leader of the Government in the Senate).
[578] See Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1996, pp 233-234 (Alexander Downer, Minister for Foreign Affairs); Commonwealth, *Parliamentary Debates*, Senate, 2 May 1996, pp 227-228 (Robert Hill, Leader of the Government in the Senate).
[579] Joint Standing Committee on Treaties, *Treaty Scrutiny: A Ten Year Review*, Report No 78 (2006) p 21.
[580] Joint Standing Committee on Treaties, *Treaty Scrutiny: A Ten Year Review*, Report No 78 (2006) p 36.

6. Budget arrangements

6.1 Introduction

The Budget is a formal event in the Parliamentary timetable with the Treasurer and Minister for Finance making speeches in Parliament and tabling the various budget-related documents. This also coincides with the introduction of the Appropriation Bills that in an historical sense mark the appropriation laws made by Parliament that control the Executive's expenditure.[1] The practice of Parliament pre-approving the Executive's expenditure traces its origins to the English Parliament's concerns about excessive Executive expenditure and one of the main compromises reflected in the *Constitution*.[2] In modern times, however, the Budget is more of an accounting for the past expenditure of the Executive, and an opportunity for the Treasurer to proclaim the achievements of the Australian Government and announce future priorities. Approximately 80 per cent of appropriations are now already committed through standing appropriations in legislation, so that the Budget accounts for approximately 20 per cent of proposed expenditure.[3] Irrespective of the intended significance of appropriating for future Executive expenditure, the Budget remains an important event in the accountability, responsibility and transparency of the Executive.[4]

The Budget and its development might be considered to be a contest between the 'guardians of the treasury' and the 'spending agencies'.[5] The 'guardians of the treasury' impose a budgetary discipline and attempt to limit expenditure within a broader policy of fiscal strategy and controls. These guardians are the Cabinet, the Department of the Treasury, the Department of Finance and Deregulation and the Department of the Prime Minister and Cabinet. Meanwhile the 'spending agencies' are the array of agencies competing to expend on product and service delivery implementing government policies according to their operational objectives (such as paying pensions, building infrastructure, and so on). This contest between the 'guardians of the treasury' and the 'spending agencies' is central to understanding the forms of resource management, evaluation, contestability and processes that characterise the Budget through its cycle from initiation to development, presentation and conclusion.[6] The increasing use of information technology and better reporting has advanced the potential to better track expenditure through this cycle. This means that modern budgeting could be devolved and there is the potential to establish greater efficiencies in allocating scarce budget resources. The Budget and its development are therefore evolving continuously there being no perfect system or science to budgeting.[7]

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[1] Notably, and as a generalisation, the history of the Australian Federation marks the consolidation of political power with that of financial power, with the expansion of the Commonwealth and the Commonwealth's executive power following the financial power: see Chapter 1. See also R Gates, 'Finance of Government' in R Spann (ed), *Public Administration in Australia* (1973) pp 216-233.

[2] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 36-45 (French CJ), 75-80 (Gummow, Crennan and Bell JJ), 106-112 (Hayne and Kiefel JJ).

[3] See Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004-05 (2004) p 11. Notably, the High Court considers that 'Standing appropriations need not be included in annual appropriations': *Brown v West* (1990) 169 CLR 195 at 207 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 603 (McHugh J).

[4] The Budget also sets out the financial records for tax collection that comprises approximately 25% of GDP, and so a significant portion of the national economy: see Department of the Treasury, *Architecture of Australia's Tax and Transfer System* (2008) p 192.

[5] See John Wanna, Joanne Kelly and John Forster, *Managing Public Expenditure in Australia* (2000) pp 41-42. See also John Wanna and Stephen Bartos, '"Good Practice: Does it Work in Theory?" Australia's Quest for Better Outcomes' in John Wanna, Lotte Jensen and Jouke de Vries (eds), *Controlling Public Expenditure: The Changing Roles of Central Budget Agencies – Better Guardians?* (2003) pp 1-29.

[6] See John Wanna, Joanne Kelly and John Forster, *Managing Public Expenditure in Australia* (2000) pp 41-47. See also Kenneth Knight and Kenneth Wiltshire, *Formulating Government Budgets: Aspects of Australian and North American Experience* (1977); Patrick Weller and James Cutt, *Treasury Control in Australia: A Study in Bureaucratic Politics* (1976).

[7] See, for example, Organisation for Economic Co-operation and Development, *Performance Budgeting in OECD Countries* (2007).

The *Charter of Budget Honesty Act 1998* (Cth) was enacted to make sure that 'Australia's economic policy is run better', 'the public is kept better informed' and 'that there is transparency in economic policy'.[8] The key measures introduced by the *Charter of Budget Honesty Act 1998* (Cth) was the requirement fiscal management to be formulated according to principles and a strategy,[9] and fiscal reporting.[10] The *Charter of Budget Honesty Act 1998* (Cth) establishes a Charter of Budget Honesty:[11]

> The Charter of Budget Honesty provides a framework for the conduct of Government fiscal policy. The purpose of the Charter is to improve fiscal policy outcomes. The Charter provides for this by requiring fiscal strategy to be based on principles of sound fiscal management and by facilitating public scrutiny of fiscal policy and performance.[12]

The Charter of Budget Honesty then sets out[13] some generally applicable principles to the development and implementation of the Budget. The *Charter of Budget Honesty Act 1998* (Cth) provides, in part:

s 4 Formulation of Government fiscal policy

(1) The Government's fiscal policy is to be directed at maintaining the on-going economic prosperity and welfare of the people of Australia and is therefore to be set in a sustainable medium-term framework.

(2) To meet this objective, the Government's fiscal strategy is to be based on the principles of sound fiscal management.

s 5 The principles of sound fiscal management

(1) The principles of sound fiscal management are that the Government is to:

- (a) manage financial risks faced by the Commonwealth prudently, having regard to economic circumstances, including by maintaining Commonwealth general government debt at prudent levels; and
- (b) ensure that its fiscal policy contributes:
  - (i) to achieving adequate national saving; and
  - (ii) to moderating cyclical fluctuations in economic activity, as appropriate, taking account of the economic risks facing the nation and the impact of those risks on the Government's fiscal position; and
- (c) pursue spending and taxing policies that are consistent with a reasonable degree of stability and predictability in the level of the tax burden; and
- (d) maintain the integrity of the tax system; and
- (e) ensure that its policy decisions have regard to their financial effects on future generations.

(2) The financial risks referred to in paragraph (1)(a) include risks such as:

- (a) risks arising from excessive net debt; and
- (b) commercial risks arising from ownership of public trading enterprises and public financial enterprises; and
- (c) risks arising from erosion of the tax base; and
- (d) risks arising from the management of assets and liabilities.

s 6 Public release and tabling of fiscal strategy statements

(1) The Treasurer is to publicly release and table the first fiscal strategy statement for a particular Government at or before the time of the Government's first budget.

(2) The Treasurer is to publicly release and table a fiscal strategy statement for the Government at the time of each of the Government's subsequent budgets.

(3) If the Government wants to change its fiscal strategy statement, it may do so at any time by the Treasurer publicly releasing and tabling a new fiscal strategy statement.

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[8] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 1997, p 12234 (Peter Costello, Treasurer).

[9] *Charter of Budget Honesty Act 1998* (Cth) s 3(1) and sch 1 (ss 4-9). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 1997, pp 12235-12236 (Peter Costello, Treasurer).

[10] *Charter of Budget Honesty Act 1998* (Cth) s 3(1) and sch 1 (ss 10-21). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 1997, p 12236 (Peter Costello, Treasurer).

[11] *Charter of Budget Honesty Act 1998* (Cth) s 3(1).

[12] *Charter of Budget Honesty Act 1998* (Cth) s 3(1) and sch 1 (s 1).

[13] Albeit '[n]othing in the Charter of Budget Honesty creates rights or duties that are enforceable in judicial or other proceedings': *Charter of Budget Honesty Act 1998* (Cth) s 3(2).

(4) If a House of the Parliament is not sitting when a fiscal strategy statement is publicly released:
(a) the statement still takes effect from its public release; and
(b) the Treasurer is to table the statement in that House of the Parliament as soon as practicable after it next sits.

At its most basic, the Budget is about appropriating money, and as such must comply with the *Constitution*'s procedural and other requirements.[14] The remaining parts of this chapter address these procedural and other requirements of the Budget.

6.2 The constitutional compromise

In respect of Appropriation Bills (and Taxation Bills) the *Constitution* provides:

> **53 Powers of the Houses in respect of legislation**
> Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.
>
> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.
>
> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.
>
> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.
>
> Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.
>
> **54 Appropriation Bills**
> The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.
>
> **55 Tax Bill**
> Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.
>
> Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.
>
> **56 Recommendation of money votes**
> A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

This formulation of laws establishes the procedures for Bills appropriating or imposing tax, except Bills imposing or appropriating 'fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services', and for these Appropriation Bills and Taxation Bills (including Bills imposing customs duties and excise duties):

(a) Appropriation Bills and Taxation Bills must be introduced in the House of Representatives.[15] This means that appropriation Bills and taxation Bills are essentially reserved for the

[14] See *Constitution* ss 53, 54, 56, 81, 83 and 94.
[15] Albeit there are exceptions in practice to this proposition: see Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) p 273 (and supplement); Ian Harris, *House of Representatives Practice* (5th ed, 2005) p 409.

Executive because the Executive commands a majority in the House of Representatives and its support is therefore necessary for Bills to be passed by that House.[16]

(b) The Senate is limited in its dealings with (i) Taxation Bills, (ii) Appropriation Bills for the 'ordinary annual services of the Government', and (iii) Bills that 'increase any proposed charge or burden on the people'. These sorts of Bills cannot be amended, albeit they can be delayed, amendments or omissions suggested or reject outright.[17]

(c) The Governor-General must have recommended the purpose of Bills including an appropriation, further entrenching the authority of the Executive by limiting appropriations to only those approved by the Executive.[18]

(d) Appropriation Bills for the 'ordinary annual services of the Government' must deal only with those matters.[19]

(e) Taxation Bills (excluding customs duties and excise duties Bills) must deal only with the imposing of a tax and only with one subject of taxation.[20] Meanwhile, customs duties and excise duties Bills must also deal only with the imposing of customs duties and excise duties and may address a number of subjects of customs duties and excise duties.[21]

The *Constitution* ss 53, 54 and 55 'must be read together',[22] albeit the distinction between 'proposed laws' in the *Constitution* ss 53 and 54 and 'laws' in the *Constitution* s 55 are distinct and significant.[23] The High Court has provided that the *Constitution* ss 53 and 54 are procedural provisions governing the intra-mural activities of the Parliament dealing with 'proposed laws' and that they are generally not justiciable.[24] Although a court might just arguably address some of the intra-mural activities of

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16 See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) p 272; Ian Harris, *House of Representatives Practice* (5th ed, 2005) pp 408-409.

17 See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) p 272; Ian Harris, *House of Representatives Practice* (5th ed, 2005) p 408. Problems might arise where the Senate 'fails to pass' Taxation Bills and Appropriation Bills as a basis for resolving differences between the Senate and the House of Representatives: see *Victoria v Commonwealth* (1975) 134 CLR 81 at 121-124 (Barwick CJ), 135-136 (McTiernan J), 154 (Gibbs J), 171-172 and 175 (Stephen J), 186-187 (Mason J), 195-196 (Jacobs J), and the references therein.

18 See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) pp 279-280; Ian Harris, *House of Representatives Practice* (5th ed, 2005) pp 407-408.

19 See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) pp 284-287; Ian Harris, *House of Representatives Practice* (5th ed, 2005) pp 415-416.

20 See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) pp 275; Ian Harris, *House of Representatives Practice* (5th ed, 2005) pp 423-429.

21 See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) pp 275; Ian Harris, *House of Representatives Practice* (5th ed, 2005) pp 428-429.

22 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 468 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

23 See, for example, *Osborne v Commonwealth* (1911) 12 CLR 321 at 336 (Griffith CJ), 351-353 (Barton J), 356 (O'Connor J).

24 *Constitution* s 53: see *Western Australia v Commonwealth* (1995) 183 CLR 373 at 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Victoria v Commonwealth and Connor* (1975) 134 CLR 81 at 161 (Gibbs J), 184 (Mason J); *Cormack v Cope* (1974) 131 CLR 432 at 453-454 (Barwick CJ); *Buchanan v Commonwealth* (1913) 16 CLR 315 at 329 (Barton ACJ). *Constitution* s 54: see *Western Australia v Commonwealth* (1995) 183 CLR 373 at 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 578 (Mason CJ, Deane, Toohey and Gaudron JJ), 585 (Brennan J), 593 (Dawson J). See also *Clayton v Heffron* (1960) 105 CLR 214 at 234 (Dixon CJ, McTiernan, Taylor and Windeyer JJ), 264 (Fullagar J), 265 (Kitto J); *Hughes & Vale Pty Ltd v Gair* (1954) 90 CLR 203 at 204-205 (Dixon CJ), 205 (McTiernan J), 205 (Webb J), 205 (Fullagar J), 205 (Kitto J), 205 (Taylor J). See also *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 70 (Gummow, Crennan and Bell JJ), 103-104 (Hayne and Kiefel JJ); *Combet v Commonwealth* (2005) 224 CLR 494 at 535-538 (McHugh J), 561 and 572-575 (Gummow, Hayne, Callinan and Heydon JJ), 598-604 (Kirby J); *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388 at 409-410 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Northern Suburbs Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 578 (Mason CJ, Deane, Toohey and Gaudron JJ), 585 (Brennan J), 594 (Dawson

the Parliament once the law is passed and where 'the constitutionally required process of law-making is not properly carried out':[25]

> Whilst the Court will not interfere in what I have called the intra-mural deliberative activities of the House, including what Isaacs J called 'intermediate procedure' and the 'order of events between the Houses',[26] there is no parliamentary privilege which can stand in the way of this Court's right and duty to ensure that the constitutionally provided methods of law-making are observed … the Court's interference to ensure a due observance of the *Constitution* in connexion with the making of laws is effected by declaring void what purports to be an Act of Parliament, after it has been passed by the Parliament and received the Royal assent. In general, this is a sufficient means of ensuring that the processes of law-making which the *Constitution* requires are properly followed, and in practice so far the Court has confined itself to dealing with laws which have resulted from the parliamentary process.[27]

When and in what circumstances the court might choose to exercise its 'right and duty' remains unclear, and most probably very, very rare given the High Court's stated concerns about separating political questions from judicial issues.[28] Meanwhile, for the *Constitution* s 55 'laws' passed by Parliament there is no doubt that they may be reviewed by the courts to assess their procedural compliance.[29]

6.2.1 Proposed laws imposing taxation (including excise duties and customs duties)

As set out above, the *Constitution* ss 53 and 55 impose specific procedural arrangements to prevent the mingling of tax matters (including excise duties and customs duties) with other non-tax matters (or 'tacking') that might not then be amendable by the Senate,[30] and the joining of different taxes (not including excise duties or customs duties) forcing the Senate to accept or reject the 'package' of

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J); *Brown v West* (1990) 169 CLR 195 at 211 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Victoria v Commonwealth* (1975) 134 CLR 338 at 421-422 (Murphy J). Notably the similar limitation applies to laws imposing taxation: see *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 468 and 471 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Osborne v Commonwealth* (1911) 12 CLR 321 at 336 (Griffith CJ), 351-353 (Barton J), 355-356 (O'Connor J). See also Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Inquiry into the Third Paragraph of Section 53 of the Constitution* (1995) pp 11-32; John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 664.

[25] *Cormack v Cope* (1974) 131 CLR 432 at 453 (Barwick CJ). See also *Victoria v Commonwealth* (1975) 134 CLR 81 at 117-119 (Barwick CJ), 162-165 (Gibbs J), 180 (Stephen J), 183 (Mason J); *Cormack v Cope* (1974) 131 CLR 432 at 464 (Menzies J), 466 (Gibbs J), 472 (Stephen J), 473 (Mason J); *Clayton v Heffron* (1960) 105 CLR 214 at 234-235 (Dixon CJ, McTiernan, Taylor and Windeyer JJ), 265 (Kitto J). Importantly, the High Court's pronouncements in *Western Australia v Commonwealth* might be distinguished on the basis that in that matter the court was not required to finally determine the matter as the submission of want of conformity with the *Constitution* s 53 'appears to be without merit': *Western Australia v Commonwealth* (1995) 183 CLR 373 at 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). A similar distinction might be applied to the High Court's decision about the *Constitution* s 54 in *Northern Suburbs Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 578 (Mason CJ, Deane, Toohey and Gaudron JJ), 585 (Brennan J), 594 (Dawson J). See also Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Inquiry into the Third Paragraph of Section 53 of the Constitution* (1995) pp 42-55.

[26] *Osborne v Commonwealth* (1911) 12 CLR 321 at 363 (Isaacs J).

[27] *Cormack v Cope* (1974) 131 CLR 432 at 454-455 (Barwick CJ). While this statement was made in a decision about the application of the *Constitution* s 57 the tenor of the decision suggests that there might be a broader role for the court: 'Whilst it may be true the Court will not interfere in what I would call the intra-mural deliberative activities of the Parliament, it has both a right and a duty to interfere if the constitutionally required process of law-making is not properly carried out' (at 453).

[28] Thus, for example, 'I assent to the argument that the jurisdiction of the High Court, if any, is judicial and not political. So far, therefore, as a controversy requires for its settlement the application of political as distinguished from judicial considerations, I think that it is not justiciable under the *Constitution*': *South Australia v Commonwealth* (1911) 12 CLR 667 at 674-675 (Griffith CJ) (see also 708 (O'Connor J), 715 (Isaacs J)). Perhaps the matters of money Bills is almost always likely to be 'political': see *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 187-188 (Isaacs J).

[29] *Osborne v Commonwealth* (1911) 12 CLR 321 at 336-337 (Griffith CJ), 351-353 (Barton J), 356 (O'Connor J). See also John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 664 and 675.

[30] See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) p 278; Ian Harris, *House of Representatives Practice* (5th ed, 2005) p 409. See also *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 471 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 341-342 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

taxes.[31] The key distinctions required by these constitutional limitation is to identify which laws are considered to be laws 'imposing taxation', and which of those laws are excepted because they contain 'provisions for the imposition … of fines or other pecuniary penalties, or for the demand or payment … of fees for licences, or fees for services under the proposed law'.[32]

Air Caledonie International v Commonwealth (1988) 165 CLR 462

These matters were well illustrated in *Air Caledonie International v Commonwealth* where the High Court considered a *Migration Amendment Act 1987* (Cth) provision that amended the *Migration Act 1958* (Cth) inserting a provision that imposed a 'fee for immigration clearance' on airlines for international airline passengers entering Australia as a debt owing to the Commonwealth.[33] Significantly, the amendment did not clearly identify the quantum of the 'fee', how it might be calculated or which passengers might be exempted.[34] The Commonwealth asserted the 'fee' was a law with respect to the *Constitution* ss 51(xxvii) (immigration and emigration), (xix) (naturalization and aliens), (i) (trade and commerce) and (xxxix) (matters incidental), and that the 'fee' was a 'fee for service'.[35] The plaintiffs contended that 'the purported exaction of the immigration clearance fee was "taxation" for the purposes of s 55 of the *Constitution*'.[36]

The High Court considered that the *Constitution* ss 53, 54 and 55 'must be read together' with the effect that 'imposing taxation' has a consistent meaning in the *Constitution* ss 53 and 55.[37] Next, the High Court considered that the 'fee' was a tax because 'it was compulsory; it was exacted by a public authority (the Commonwealth itself) for public purposes …; it (or its "amount") was enforceable by law'.[38] This adopted the approach and the substance of whether the law was a law with respect to taxation within the Parliament's legislative authority in *Constitution* s 51(ii).[39] Once considered a tax the issue for the High Court was to assess whether there were any features of the 'fee' that might 'preclude its characterization as "taxation"'.[40] As the 'fee' applied to returning Australian citizens, who had a right under law to re-enter,[41] they were properly characterised as 'taxation' and a law 'imposing taxation': 'the question whether the [amending provisions] are properly to be characterized as a law "imposing taxation" must be answered on the basis that they applied

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[31] See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) p 278.
[32] *Constitution* ss 53 and 55.
[33] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 464 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[34] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 465 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[35] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 466 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[36] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 466 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[37] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 468 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[38] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 468 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). Notably the issue of characterising a law as a law with respect to taxation remains contested because the definition of 'taxation' remains uncertain: see, for examples, *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 177-179 (Gleeson CJ and Kirby J), 189-192 (Gaudron J), 230-237 (McHugh J), 279-287 (Gummow J), 303 (Hayne J); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1991) 176 CLR 480 at 503-505 (Mason CJ, Brennan, Deane and Gaudron JJ); and so on.
[39] It appears this restriction to 'imposing taxation' is confined to the *Constitution* s 51(ii), and might not apply to other heads of power under which taxation may be imposed: see *Buchanan v Commonwealth* (1913) 16 CLR 315 at 329-330 (Barton ACJ), 335 (Isaacs J), 335 (Gavin Duffy and Rich JJ); *Osborne v Commonwealth* (1911) 12 CLR 321 at 341-342 (Griffith CJ), 350-351 (Barton J), 357 (O'Connor J), 363 (Isaacs J).
[40] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 468 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[41] See *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 470 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

indifferently with respect to returning citizens and visiting non-citizens'.[42] The Commonwealth asserted the 'fee' was rather a fee for the clearance of returning citizens and as such was in the nature of the *Constitution* s 53 exception of 'fees for service'.[43] The result:

> A requirement that a returning citizen submit, in the public interest, to the inconvenience of such administrative procedures at the end of a journey cannot, however, properly be seen as the provision or rendering of 'services' to, or at the request or direction of, the citizen concerned. Nor is it possible to find in [the amending provisions] (or in any other provision of the Act) any identification of particular services provided or rendered to the individual passenger for which the impost could relevantly be regarded as a fee or quid pro quo … one need do no more than refer to the second reading speech of the responsible Minister … to confirm that the moneys intended to be raised by the purported impost were not related to particular services to be supplied to particular passengers but were intended to provide, when paid into consolidated revenue, a general off-setting of the administrative costs of certain areas of the relevant Commonwealth Department, including, for example, the administrative costs involved in maintaining facilities for the issue of visas in overseas countries and 'general administrative overheads'. Therefore, the fee which [the amending provisions] purported to exact was, at least in so far as it related to passengers who were Australian citizens, a tax and the provisions of the section were, for relevant purposes, a law 'imposing taxation'.[44]

The remaining issue was for the High Court to find that it was the amending provision in the amending Act, rather than the principal Act, that was invalidated.[45] Further, in the amending Act it was only the offending provision in the *Migration Amendment Act 1987* (Cth) that was 'ineffective'.[46] The significance of *Air Caledonie International v Commonwealth* was to show that the High Court addresses the *Constitution* ss 53 and 55 by: first, determining whether the law is characterised as a law with respect to taxation within the *Constitution* s 51(ii); second, whether any of the *Constitution* s 53 exceptions applied; and finally which law was invalidated.

An important practical requirement is that taxation Bills (excluding taxation Bills addressed to excise duties and customs duties) may only address one subject of taxation,[47] and there is an important practical distinction between laws 'imposing taxation' and laws 'dealing with taxation' (including taxation Bills addressed to excise duties and customs duties).[48] The *Constitution* ss 53 and 55 *only* apply to laws 'imposing taxation', and as a consequence, taxation Bills are separated into a Bill imposing the *one* tax, or *multiple* excise duties or customs duties, and setting the quantum, that cannot be amended by the Senate, with a different Bill outside the limitation of the *Constitution* ss 53 and 55 providing for their administration, assessment, collection, and so on, that may be amended by the Senate:[49]

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[42] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 469 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

[43] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 469 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

[44] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 470-471 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

[45] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 471-472 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

[46] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 472 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

[47] See *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 340-344 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), 358 (Brennan J), 374-375 (Deane J); *Moore v Commonwealth* (1951) 82 CLR 547 at 564-565 (Latham CJ), 569 (Dixon CJ); *Cadbury-Fry-Pascall Pty Ltd v Federal Commissioner of Taxation* (1944) 70 CLR 362 at 372-373 (Latham CJ), 386 (McTiernan J); *Osborne v Commonwealth* (1911) 12 CLR 321 at 335 and 340 (Griffith CJ), 349-351 (Barton J), 354-355 (O'Connor J), 363-365 (Isaacs J), 372-374 (Higgins J).

[48] See *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 341-342 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), 358 (Brennan J), 365 (Deane J); *Re Dymond* (1959) 101 CLR 11 at 17 (Dixon CJ), 18 (Fullagar J), 23 (Kitto J), 29 (Windeyer J); *Moore v Commonwealth* (1951) 82 CLR 547 at 564-565 (Latham CJ), 569 (Dixon CJ), 573 (McTiernan J), 574 (Webb J); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 190-192 (Isaacs J). See also *Osborne v Commonwealth* (1911) 12 CLR 321 at 335-336 (Griffith CJ), 351-354 (Barton J), 355 (O'Connor J).

[49] See also *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 341 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), 358 (Brennan J), 365 (Deane J); *Re Dymond* (1959) 101 CLR 11 at 17 (Dixon CJ), 20-21 (Fullagar J), 23 (Kitto J), 29 (Windeyer J); *Moore v Commonwealth* (1951) 82 CLR 547 at 569 (Dixon CJ), 573 (McTiernan

> By reason of the provisions of s 55 it has been the invariable practice since the establishment of the Commonwealth, when Parliament has proposed to levy a tax on any subject of taxation, to pursue that object by means of two separate Acts, the one of which actually imposes the tax and fixes the rate of tax, and the other of which provides for the incidence, assessment, and collection, of the tax and for a variety of incidental matters. It is common to refer to the latter Act as the Assessment Act, and to the former as the Taxing Act. When Parliament decided in 1930 to levy a tax on sales of goods, this practice was followed, and, since it was proposed to levy the tax on nine different classes of sales, nine pairs of Acts, numbered consecutively, were passed. In each case the tax was imposed by a Taxing Act, which has been amended from time to time. So far as the Assessment Acts are concerned, the necessary general provisions were set out in Act No 1, and most of these were not repeated but incorporated by reference in each of the other eight Acts.[50]

Where the taxation Bill addresses excise duties and customs duties the same division between the imposing of the excise duties or customs duties and setting the quantum, and their administration, assessment, collection, and so on, applies, although a number of excise duties and customs duties can be included in the same Bill.[51]

6.2.2 Proposed laws appropriating revenue or moneys

As set out above, the *Constitution* ss 53 and 54 impose specific procedural arrangements on appropriation Bills with different requirements applying to different categories of Bills: Bills appropriating the 'ordinary annual services of the Government'; Bills appropriating 'fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services'; and, all other appropriation Bills. In each instance an appropriation Bill will be one that allows money to be drawn from the Treasury of the Commonwealth according to the obligations imposed by the *Constitution* ss 81 and 83. As a consequence of these procedural requirements, and the distinction in the *Constitution* s 54 between appropriations for the 'ordinary annual services of the Government' and other appropriations, the Budget is divided into a number of separate Bills: the Appropriation Bills (No 1) dealing with those appropriation considered to be for the 'ordinary annual services of the Government' and Appropriation Bill (No 2) dealing with the other appropriations.[52] Further, appropriations other than for the 'ordinary annual services of the Government' may be included in other legislation, and in recent times, these standing and extraordinary appropriations have become the major form of appropriations.[53]

6.2.3 'Ordinary annual services of the Government'

To comply with the *Constitution* ss 53 and 54 the annual Appropriation Acts are divided:[54] one dealing with the 'ordinary annual services of the Government' and the other dealing with expenditure other than the 'ordinary annual services of the Government'.[55] The divide between what

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J), 574 (Webb J); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 185-187 and 190 (Isaacs J); *Osborne v Commonwealth* (1911) 12 CLR 321 at 340 (Griffith CJ), 351-354 (Barton J), 355-356 (O'Connor J). See also Standing Committee on Legal and Constitutional Affairs, Senate, *Taxation (Deficit Reduction) Bill 1993* (1993); Commonwealth, *Parliamentary Debates*, Senate, 27 September 1993, pp 1183-1192 (Amanda Vanstone, Senator for South Australia and Barney Cooney, Senator for Victoria).

[50] *Osborne v Commonwealth* (1911) 12 CLR 321 at 335-336 (Griffith CJ). See also *Re Dymond* (1959) 101 CLR 11 at 18 (Fullagar J).

[51] See *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 453 (Mason CJ, Brennan and McHugh JJ), 455-460 (Deane J), 465 and 470-471 (Dawson, Toohey and Gaudron JJ).

[52] See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) pp 273-275; Ian Harris, *House of Representatives Practice* (5th ed, 2005) pp 414-422.

[53] These concerns were addressed in 'Operation Sunlight': see Andrew Murray, *Review of Operation Sunlight: Overhauling Budget Transparency* (2008).

[54] This also assumes that the proposed appropriation law has, in the same session, been recommended by a message of the Governor-General to the Parliament: *Constitution* s 56. See Australian Constitutional Commission, *Final Report of the Constitutional Commission*, vol 2 (1988) pp 221-223.

[55] For example, *Appropriation Act (No 1) 2008-2009* (Cth) dealt with the 'ordinary annual services of the Government' and *Appropriation Act (No 2) 2008-2009* (Cth) dealt expenditure other than the 'ordinary annual services of the Government'. Notably, additional appropriation Acts also maintain the distinction with subsequent numbering, hence *Appropriation Act (No 3) 2008-2009* (Cth) and *Appropriation Act (No 4) 2008-2009* (Cth).

are and are not the 'ordinary annual services of the Government' has been contentious,[56] and continues to evolve as an agreement between the Senate and the Australian Government.[57] At present this agreement is reflected in the 'Compact of 1965' together with the alterations agreed in 1987 following the introduction of the 'running costs' system of appropriations and in 1999 on the introduction of accrual budgeting and outcome/output/program arrangements.[58] The Senate's position on the interpretation of the 'ordinary annual services of the Government' appropriation is as follows:[59]

(a) The Compact of 1965 affirmed by the Senate in 1977 –

> That the Senate resolves:
> (1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government.
> (2) That appropriations for expenditure on:
> (a) the construction of public works and buildings;
> (b) the acquisition of sites and buildings;
> (c) items of plant and equipment which are clearly definable as capital expenditure;
> (d) grants to the States under s 96 of the *Constitution*; and
> (e) new policies not previously authorised by special legislation, are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys or expenditure on the said matters shall be presented to the Senate in a separate Appropriation Bill subject to amendment by the Senate.[60]

(b) The 1999 modification –

> (i) items regarded as equity injections and loans be regarded as not part of ordinary annual services
> (ii) all appropriation items for continuing activities for which appropriations have been made in the past be regarded as part of ordinary annual services

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[56] See, for examples, Finance and Public Administration Committee, Senate, *Additional Estimates 2007-08* (2008) pp 7-9; Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 37-42 and the references therein; Harry Evans, *Odgers' Australian Senate Practice* (12th Ed 2008) pp 284-287 and the references therein (and supplement); Ian Harris, *House of Representatives Practice* (5th ed, 2005) pp 415-416; Australian National Audit Office Audit Report, *ASIC's Implementation of Financial Services Licences*, No 25 of 2005-06 (2006) pp 40-41; Appropriations and Staffing Committee, Senate, *Security Funding Appropriation Bills: Payments to International Organisations* (2004) p 2 and Appendix 1; Appropriations and Staffing Committee, Senate, *Thirtieth Report* (1999) p 3. See also Australian Constitutional Commission, *Final Report of the Constitutional Commission*, vol 2 (1988) pp 223-262 and the references therein.

[57] Commonwealth, *Parliamentary Debates*, Senate, 22 June 2010, pp 3867-3868 (motion adopting Senate Appropriations and Staffing Committee recommendation agreed). See also Appropriations and Staffing Committee, Senate, *Fiftieth Report* (2010) pp 2-3 and app 2; Appropriations and Staffing Committee, Senate, *2006-07 Annual Report* (2007) pp 1-2 and app 1; Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 37-42; Appropriations and Staffing Committee, Senate, *2005-06 Annual Report* (2006) p 2 and app 1.

[58] See Commonwealth, *Parliamentary Debates*, Senate, 22 April 1999, p 4198 (motion adopting Senate Appropriations and Staffing Committee agreed). See also Appropriations and Staffing Committee, Senate, *Thirtieth Report* (1999) p 3; Minister for Finance and Deregulation, *Budget: Agency Resourcing*, Budget Paper No 4 (2008) p 1; Appropriations and Staffing Committee, Senate, *2006-07 Annual Report* (2007) pp 1-2 and app 1; Appropriations and Staffing Committee, Senate, *2005-06 Annual Report* (2006) p 2 and app 1. Notably, there remains some dispute about the division of content between the Appropriation Acts: see, for examples, Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 37-42; Standing Committee on Finance and Public Administration, Senate, *Annual Reports*, No 2 of 2007 (2007) pp 7-8.

[59] Noting that this does not appear to be the view of the Australian Government: see, for example, Appropriations and Staffing Committee, Senate, *Fiftieth Report* (2010) p 2 and app 1.

[60] Commonwealth, *Journals of the Senate*, 17 February 1977, p 572; Commonwealth, Parliamentary Debates, House of Representatives, 13 May 1965, p 1485 (Harold Holt, Treasurer). See also *Combet v Commonwealth* (2005) 224 CLR 494 at 573 (Gummow, Hayne, Callinan and Heydon JJ), 602 (Kirby J); Harry Evans, *Odgers' Australian Senate Practice* (12th Ed 2008) pp 285-286.

(iii) all appropriations for existing asset replacement be regarded as provision for depreciation and part of ordinary annual services.[61]

Unfortunately there remains dispute between the Executive and the Senate about the exact meaning of this text,[62] and some uncertainty about what kind of appropriations should be included as the 'ordinary annual services of the Government' and so outside the Senate's ambit of amendment.[63] However, there is renewed interest in the Australian Government finding resolution to any disagreements with the Senate, and clarifying what are and are not the 'ordinary annual services of the Government'.[64] Despite these attempts, the solution seems to remain deadlocked, the Senate recently concluding:

> The committee notes the view of the Executive as conveyed by the Minister for Finance and Deregulation, and notes that the Minister's response has not provided a way forward to resolve this difference of view.
>
> That being the case, the committee has resolved that, consistent with its approach to this issue over many years … the solution to the problem is to return to the Senate's original determination, so that new policies for which no money has been appropriated in previous years are separately identified in their first year in the appropriation bill which is not for the ordinary annual services of the government.[65]

The Senate has thus re-stated its consolidated position on the 'ordinary annual services of the government':

> The Senate resolves:
> (1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government.
> (2) That appropriations for expenditure on:
> (a) the construction of public works and buildings;
> (b) the acquisition of sites and buildings;
> (c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
> (d) grants to the states under section 96 of the *Constitution*;
> (e) new policies not previously authorised by special legislation;
> (f) items regarded as equity injections and loans; and

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[61] Commonwealth, *Journals of the Senate*, 22 April 1999, p 777. See Appropriations and Staffing Committee, Senate, *Thirtieth Report* (1999) p 3. See also *Combet v Commonwealth* (2005) 224 CLR 494 at 575 (Gummow, Hayne, Callinan and Heydon JJ); Harry Evans, *Odgers' Australian Senate Practice* (12th Ed 2008) p 286.

[62] See Appropriations and Staffing Committee, Senate, *2008-09 Annual Report* (2009) p 1 and Appendix 1; Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 37-42; Appropriations and Staffing Committee, *2006-07 Annual Report* (2007) pp 1-2 and Appendix 1; Appropriations and Staffing Committee, Senate, *2005-06 Annual Report* (2006) p 3 and Appendix 1. See also Commonwealth, *Parliamentary Debates*, Senate, 20 August 2009, p 5596 (Stephen Conroy), 16 September 2009, p 6739 (Bob Brown), 19 March 2008, pp 1344-1348 (Andrew Murray), 20 March 2008, p 1410 (John Faulkner).

[63] For a summary of the Senate's concerns see Appropriations and Staffing Committee, Senate, *Forty Fifth Report* (2008) p 2. See also Commonwealth, *Parliamentary Debates*, Senate, 22 June 2010, pp 3867-3868 (Joe Ludwig, Special Minister of State and Cabinet); Commonwealth, *Parliamentary Debates*, Senate, 19 March 2008, p 1344 (Andrew Murray). See also Commonwealth, *Parliamentary Debates*, Senate, 4 February 2010, pp 63-64 (Government response); Joint Committee of Public Accounts and Audit, *The Efficiency Dividend and Small Agencies: Size Does Matter*, Report 413 (2008) pp 78-79.

[64] See Appropriations and Staffing Committee, Senate, *Fiftieth Report* (2010) pp 1-2; Appropriations and Staffing Committee, Senate, *Forty Fifth Report* (2008) pp 1-2. See also Commonwealth, *Parliamentary Debates*, Senate, 19 March 2008, pp 1344-1348 (Andrew Murray), 20 March 2008, p 1410 (John Faulkner); Department of Finance and Deregulation, *Government Response to the Review of Operation Sunlight: Overhauling Budget Transparency* (2008) p 3; Andrew Murray, *Review of Operation Sunlight: Overhauling Budget Transparency* (2008) pp 11-16. See also Appropriations and Staffing Committee, Senate, *2008-09 Annual Report* (2009) p 1 and Appendix 1; Standing Committee on Finance and Public Administration, Senate, *2007-08 Additional Estimates* (2008) pp 8-9; Standing Committee on Finance and Public Administration, Senate, *Annual Reports (No. 2 of 2007)* (2007) pp 7-8; Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 37-42; Appropriations and Staffing Committee, *2006-07 Annual Report* (2007) pp 1-2 and Appendix 1; Australian National Audit Office, *ASIC's Implementation of Financial Services Licences*, Audit Report No 25 2005-06 (2006) pp 40-41; Appropriations and Staffing Committee, Senate, *2005-06 Annual Report* (2006) p 3 and Appendix 1.

[65] Appropriations and Staffing Committee, Senate, *Fiftieth Report* (2010) p 2.

(g) existing asset replacement (which is to be regarded as depreciation), are not appropriations for the ordinary annual services of the government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

(3) That, in respect of payments to international organisations:
   (a) the initial payment in effect represents a new policy decision and therefore should be in Appropriation Bill (No 2); and
   (b) subsequent payments represent a continuing government activity of supporting the international organisation and therefore represent an ordinary annual service and should be in Appropriation Bill (No 1).

(4) That all appropriation items for continuing activities for which appropriations have been made in the past be regarded as part of ordinary annual services.[66]

Significantly, the Senate can decline to pass the 'ordinary annual services of the Government' annual Appropriation Bills and items in those Bills until relevant requested information is provided or request that an 'omission or amendment' be made.[67] Presumably, the Senate could instigate a constitutional crisis by decline to pass the 'ordinary annual services of the Government' annual Appropriation Bills in effect blocking supply for the day to day running of government.[68] This might, however, be unrealistic and is more likely to remain an ongoing and evolving negotiation. Indeed in practice, Bills have been passed in the form presented despite the asserted position of the Senate.

The significance of the cases addressing this aspect of the *Constitution* is to show that while the content of the 'ordinary annual services of the Government' may not be justiciable[69] the location of an appropriation within an annual Appropriation Act according to the 'ordinary annual services of the Government' divisions does have consequences.

Brown v West (1990) 169 CLR 195

Thus, in *Brown v West* (see also ¶7.6.2, p 226) the appropriation of an amount for an increased postal allowance was argued to be found in the *Supply Act (No 1) 1989-1990* (Cth).[70] The High Court rejected this contention on the basis that parliamentary practice dictated that an appropriation in the *Supply Act (No 1) 1989-1990* (Cth) was only for the 'ordinary annual services of the Government' and could not include an appropriation for a new policy.[71] As the increased postal allowance was a new policy the *only* place such an appropriation might be found was in an Appropriation Bill (No 2) or as a standing appropriation in separate legislation.[72]

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[66] Appropriations and Staffing Committee, Senate, *Fiftieth Report* (2010) app 2.

[67] *Constitution* s 53. See also Harry Evans, *Odgers' Australian Senate Practice* (12th Ed 2008) pp 304-311 and the references therein.

[68] See Commonwealth, *Parliamentary Debates*, Senate, 19 March 2008, p 1346 (Andrew Murray).

[69] Notably the *Constitution* ss 53 and 54 governing the intra-mural activities of the Parliament are not probably not justiciable: see *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388 at 409-410 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Western Australia v Commonwealth* (1994) 183 CLR 373 at 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 578 (Mason CJ, Deane, Toohey and Gaudron JJ), 585 (Brennan J), 594 (Dawson J); *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 471 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Victoria v Commonwealth* (1975) 134 CLR 338 at 421-422 (Murphy J); *Victoria v Commonwealth and Connor* (1975) 134 CLR 81 at 184 (Mason J); *Cormack v Cope* (1974) 131 CLR 432 at 454 (Barwick J); *Buchanan v Commonwealth* (1913) 16 CLR 315 at 329 (Barton ACJ); *Osborne v Commonwealth* (1911) 12 CLR 321 at 336 (Griffith CJ), 351-352 (Barton J), 355-356 (O'Connor J). See also *Combet v Commonwealth* (2005) 224 CLR 494 at 535-538 (McHugh J), 572-575 (Gummow, Hayne, Callinan and Heydon JJ), 598-604 (Kirby J); *Brown v West* (1990) 169 CLR 195 at 211 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[70] *Brown v West* (1990) 169 CLR 195 at 200 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[71] *Brown v West* (1990) 169 CLR 195 at 209-211 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[72] *Brown v West* (1990) 169 CLR 195 at 211 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *Cemetery Reserve case* (1993) 176 CLR 555 at 578-579 (Mason CJ, Deane, Toohey and Gaudron JJ), 585 (Brennan J), 594 (Dawson J), 603 (McHugh J).

Combet v Commonwealth (2005) 224 CLR 494

In *Combet v Commonwealth* (see also ¶7.6.1, p 221; ¶7.6.2, p 227), however, the argument was that payments made for an advertising campaign in anticipation of legislation (a new policy) could not be appropriated in the *Appropriation Act (No 1) 2005-2006* (Cth) as they were not for the 'ordinary annual services of the Government'.[73] Gleeson CJ and the joint judgment both agreed that the boundaries of the appropriations were unclear and that parliamentary history and practice were of little assistance,[74] with the joint judgment commenting:

> … what does emerge from consideration of the Compact of 1965 and subsequent events is the difficulty of marking any clear boundary around the types of expenditure that after 1987-1988 were included within the 'running costs' appropriation for a department, or, since the adoption of accrual accounting and budgeting, fall within a 'departmental item'. Rather, as counsel for the defendants submitted, neither the Compact of 1965 in its original form, nor in the form it now takes, sheds any useful light on that question.[75]

Even when a resolution has been found between the Australian Government and the Senate, this will only affect 'annual' appropriations, leaving unaffected the majority of standing appropriations.[76] The distinction between an Appropriation Act dealing with the 'ordinary annual services of the Government' and another Appropriation Act will then remain a basis for asserting a particular construction of an appropriation. However, the decisions in *Brown v West* and *Combet v Commonwealth* that validates broadly stated purposes, and arguable in *Combet v Commonwealth* that legitimises an appropriation limited only by a stated amount,[77] might make such an argument difficult to establish. The resolution is, in practice, for the Parliament to find at the time of making an Appropriation Act what are and are not the 'ordinary annual services of the Government',[78] and this appears to be being taken up by the Australian Government and the Senate.[79]

6.2.4 Proposed charge or burden

The *Constitution* s 53 provides that the Senate 'may not amend any proposed law so as to increase any proposed charge or burden on the people'. This provision appears to limit the capacity of the Senate to impose additional expenditure from the Executive's revenues and money that would otherwise have to be funded through revenue and money collected through laws imposing taxation, excise duties and customs duties that the Senate is unable to amend:

> … the Senate is only forbidden to amend tax bills and the annual appropriation bill; it may amend two kinds of expenditure bills, viz: those for permanent and extraordinary appropriations. If the Senate could propose an increase in the amount of money to be spent in a public work bill – say from one million sterling to two million sterling – that amendment would necessitate increased taxation in order to give effect to it, and consequently an addition to the burdens and charges of the people. The Senate may amend such money bills so as to reduce the total amount of expenditure or to change the method, object, and destination of the expenditure, but not to increase the total expenditure or to change the total expenditure originated in the House of Representatives.[80]

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[73] *Combet v Commonwealth* (2005) 224 CLR 494 at 521 (Gleeson CJ), 531-532 (McHugh J), 559 (Gummow, Hayne, Callinan and Heydon JJ), 579-580 (Kirby J), albeit the major argument was about the construction of the *Appropriation Act (No 1) 2005-2006* (Cth).

[74] *Combet v Commonwealth* (2005) 224 CLR 494 at 531 (Gleeson CJ), 575-576 (Gummow, Hayne, Callinan and Heydon JJ). Notably, Gleeson CJ stated that 'departmental expenditure', being expenditure for the 'ordinary annual services of the Government' might not include 'expenditure which is so clearly unrelated to the business of the Department that it could not rationally be regarded as expenditure for the purpose of that business' (at 529).

[75] *Combet v Commonwealth* (2005) 224 CLR 494 at 575-576 (Gummow, Hayne, Callinan and Heydon JJ).

[76] See *Brown v West* (1990) 169 CLR 195 at 206-208 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *Cemetery Reserve case* (1993) 176 CLR 55 at 578-579 (Mason CJ, Deane, Toohey and Gaudron JJ), 579 (Brennan J), 594 (Dawson J), 603 (McHugh J).

[77] See *Combet v Commonwealth* (2005) 224 CLR 494 at 577 (Gummow, Hayne, Callinan and Heydon JJ).

[78] See Andrew Murray, *Review of Operation Sunlight: Overhauling Budget Transparency* (2008) pp 11-16.

[79] See Department of Finance and Deregulation, *Government Response to the Review of Operation Sunlight: Overhauling Budget Transparency* (2008) p 3. Perhaps surprisingly, reaching an agreement does not appear to be part of the Australian Government's revised Operation Sunlight program: see Department of Finance and Deregulation, *Operation Sunlight: Enhancing Budget Transparency* (2008).

[80] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 671.

The main contentions arise in the capacity of the Senate to amend legislation, and whether a more appropriate response for the Senate is to request an amendment. The matter was addressed in detail when the Senate proposed amendments to definitions in the *Taxation Laws Amendment Bill (No 4) 1994* (Cth) with the effect of removing deductions available to taxpayers so that taxpayers would have been in a worse financial position than they would otherwise have been without the amendments.[81] The outcome for the Senate in this matter was to request an amendment from the House of Representatives while maintaining that the Senate was not committed to accepting a request was in fact necessary.[82] The distinction between a request and an amendment is:

> … the essence of the difference between a request and an amendment is that in the case of a request, the Senate does not alter the form of the bill and the right of the decision as to the form of the Bill rests with the House of Representatives while the fate of the Bill with the Senate.[83]

With no clear or agreed meaning for the phrase 'increase any proposed charge or burden on the people',[84] the Senate and the House of Representatives have adopted practices to distinguish the relevant 'proposed laws' to which this provision applies.[85] The matter remains to be resolved albeit the lack of clear meaning does not appear to have limited the work of the Parliament and the relations between the Senate and the House of Representatives:

> Since the House and Senate committee reports on the 3rd paragraph of s 53, the House has sometimes shown its preference to avoid delaying the business of the Parliament with debates on the matter. On occasions when the Chair has drawn the attention of the House to Senate amendments where the position was unclear, the House has thought it appropriate not to take any objection.[86]

The significance of the different propositions for the likely meaning between the Senate and the House of Representatives is, at least, agreement that the constitutional limitation applies *only* to appropriation Bills other than those for the 'ordinary annual services of the Government'.[87] As a generalisation, this issue will be most relevant where the Senate proposes increases to standing appropriations.[88]

6.3 Accrual budgeting

The adoption of accrual budgeting followed the recommendations of the 1996 National Commission of Audit, and the groundswell of public administration reforms in the 1980s and 1990s addressing the control and management of government expenditure:[89]

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[81] See Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Inquiry into the Third Paragraph of Section 53 of the Constitution* (1995) pp 3-6 and the references therein.

[82] See Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Inquiry into the Third Paragraph of Section 53 of the Constitution* (1995) p 4 and the references therein.

[83] Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Inquiry into the Third Paragraph of Section 53 of the Constitution* (1995) p 6. See also Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) pp 288-290; Ian Harris, *House of Representatives Practice* (5th ed, 2005) pp 435-437.

[84] See generally Procedure Committee, Senate, *Section 53 of the Constitution: Incorporation into the Standing Orders of Continuing and Sessional Orders* (1996); Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Inquiry into the Third Paragraph of Section 53 of the Constitution* (1995).

[85] See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) pp 287-290 and the references therein (and supplement); Ian Harris, *House of Representatives Practice* (5th ed, 2005) pp 435-437 and the references therein.

[86] Ian Harris, *House of Representatives Practice* (5th ed, 2005) pp 439-440.

[87] See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) pp 288-290; Ian Harris, *House of Representatives Practice* (5th ed, 2005) p 437.

[88] Noting that approximately 80 per cent of appropriations are standing appropriations in legislation: see Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004-05 (2004) p 11.

[89] A useful list of the evolving policy considerations and developments are set out in Organisation for Economic Co-operation and Development, *Chronology of SBO Meetings and Articles in the OECD Journal on Budgeting*, 30th Annual Meeting of OECD Senior Budget Officials (2009) GOV/PGC/SBO/RD(2009) p 1. See also Peter Boxall, 'How the Reforms Fit Together: An Australian Perspective' (1999) 88 *Canberra Bulletin of Public Administration* 117.

> Accrual budgeting focuses on all resources controlled, managed and consumed by an entity for the purposes of achieving its objectives, not simply the anticipated cash receipts and payments. Accrual or total resource budgeting facilitates:
> - clear and complete financial plans and easier monitoring and control of actual performance.
> - accounting for all resources consumed by the budgeting entity in providing its goods and services.
> - better information for the planning and controlling of both current and capital expenditure.
> - the management of cash flows.[90]

The *Financial Management Legislation Amendment Act 1999* (Cth)[91] then aligned the legislative framework of the original *Financial Management and Accountability Act 1997* (Cth) with accrual budgeting appropriations.[92] The amending Act essentially replaced the 'fund accounting' of cash transaction that had been carried over from the *Audit Act 1901* (Cth) with accounting for assets, liabilities, expenses and revenues (both cash and non-cash resources, resources uses and revenues). Further:

> The requirements for debiting and crediting all cash transactions to a fund account in a central ledger will be removed. In future, transactions of Agencies will be processed and recorded in their own accounting systems. The amendments will therefore facilitate the move to devolve accounting and banking arrangements for Agencies, consistent with more business like approaches used in the private sector.[93]

Essentially, the amending Act removed the requirement that all cash transactions be debited or credited to a fund account in a central ledger and provided for the transactions of Agencies to be processed and recorded in their own accounting systems, and according to an accrual accounting methodology:

> Accrual accounting is a basis of accounting whereby the financial effects of transactions and events are recognised when they occur (and not as cash is received or paid) and included in financial statements for the reporting periods to which they relate.[94]

Another characterisation of accrual accounting:

> Accrual accounting allows for the recognition and recording of economic transactions and events as they occur, regardless of when (or whether) the related cash receipt or payment takes place. For example, in the books of a business that sells goods, a sale would be recorded as 'income', even though payment from the purchaser may not yet have been received; the purchaser would be recorded under the asset heading 'Debtors'. Subsequent payment would be recorded as an increase in the asset 'Cash' and an offsetting reduction in 'Debtors'. Correspondingly, a purchaser's failure to pay would cause an increase in the expense item 'Bad Debts Written Off', with an offsetting reduction in 'Debtors'.[95]

The result of these amendments and the adoption of accrual budgeting (or appropriations) has been to include within the Budget the assets, liabilities, expenses and revenues, instead of just cash

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[90] National Commission of Audit, *Report to the Commonwealth Government* (1996) p 121.

[91] See Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 1999, p 2283 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration). Other amendments were included in the *Public Employment (Consequential and Transitional) Amendment Act 1999* (Cth) *Financial Management and Accountability Amendment Act 2000* (Cth) *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth) and the *Parliamentary Service (Consequential and Transitional) Determination 2000/1* (Cth).

[92] For an overview of 'accrual budgeting' see Jón Blöndal, 'Issues in Accrual Budgeting' (2004) 4 *OECD Journal on Budgeting* 103; Jón Blöndal, 'Accrual Accounting and Budgeting: Key Issues and Recent Developments' (2003) 3 *OECD Journal on Budgeting* 43.

[93] Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) p 1.

[94] Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) p 3.

[95] Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) p 6.

receipts and payments.[96] More broadly, accrual budgeting was intended to address the microeconomic benefits in improving the efficiency and effectiveness of expenditure by shifting the Budget focus away from cash payments to identifiable and quantitative limits on the expenses – rather than an amount of cash that needed to be spent in each budgetary period, the new focus was on expenses up to an agreed limit to deliver particular programs (or outputs).[97] Thus, the justification for this approach was essentially to promote results-oriented decision making with a focus on better assessing the government's activities and steering those activities towards desired political objectives.[98] This budgeting approach has also expanded the information available in the Budget to include non-cash resource usage and revenues such as depreciation, long service leave liabilities, and so on, with the imperative of improving budget decision making and financial management.[99] Thus, the benefits of accrual budgeting is that it:

- improves the effectiveness and efficiency of expenditure. More concretely, by ensuring that these budgetary decisions are made in the light of the true costs of inputs and outputs, accrual budgeting promotes better choices about expenditure priorities (allocative efficiency), about the inputs to be used in producing public services (technical efficiency), and about outsourcing *versus* internal production (technical efficiency).
- improves decision making with respect to assets – including the acquisition, disposal and maintenance of fixed assets, and the management of stocks. Of particular relevance to this article are the incentives for spending ministries to sell unneeded nonfinancial assets, arising from the inclusion of depreciation in the expenses budget. The sale of such assets reduces the ministry's depreciation charge and thereby permits increased spending on other types of expenses (footnote omitted).[100]

The significant consequence of this approach is that an Agency is now funded according to an agreed price for its outputs/programs, and this can include non-cash items such as depreciation. The Budget documents are now structured in a way, using distinctions between outcomes and programs and administered and departmental items that, hopefully, mean the price of outputs/programs can be assessed against agreed performance levels (set out in more detail below).

Another significant budget division is also made between the General Government Sector (GGS) and other sectors of government. This distinction is founded in the *Charter of Budget Honesty Act 1998* (Cth) that requires that the *Budget Economic and Fiscal Outlook Report*,[101] the *Mid-year Economic and Fiscal Outlook Report*,[102] and the *Final Budget Outcome Report*,[103] complies with 'external reporting standards' defined as 'the concepts and classifications set out in GFS Australia' and 'public sector accounting standards developed by the Public Sector Accounting Standards Board'.[104] The term 'GFS Australia' is then defined to mean:

> … the publication of the Australian Bureau of Statistics known as Government Finance Statistics Australia: Concepts, Sources and Methods, as updated from time to time. This updating takes 2 forms:
> (a) from time to time, a new version of the publication is produced;
> (b) from time to time, material in the current version of the publication is updated by other publications of the Australian Bureau of Statistics.[105]

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[96] Notably, 'capital charging' – where both the depreciation of the assets used and the normal rate of return on those assets as an investment are treated as costs – was abolished in 2002. See also Jón Blöndal, 'Issues in Accrual Budgeting' (2004) 4 *OECD Journal on Budgeting* 103 at 115.

[97] See, for example, Marc Robinson, 'Accrual Budgeting and Fiscal Policy' (2009) 9 *OECD Journal on Budgeting* 75 at 77-79 and the references therein.

[98] See, for example, Dirk-Jan Kraan, 'Programme Budgeting in OECD Countries' (2007) 7 *OECD Journal on Budgeting* 7 at 9-10.

[99] See, for example, Finance and Public Administration Legislative and General Purpose Committee, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 6-11.

[100] Marc Robinson, 'Accrual Budgeting and Fiscal Policy' (2009) 9 *OECD Journal on Budgeting* 75 at 78-79. See also Jón Blöndal, 'Issues in Accrual Budgeting' (2004) 4 *OECD Journal on Budgeting* 103 at 105-107.

[101] *Charter of Budget Honesty Act 1998* (Cth) s 12.

[102] *Charter of Budget Honesty Act 1998* (Cth) s 16.

[103] *Charter of Budget Honesty Act 1998* (Cth) s 19.

[104] *Charter of Budget Honesty Act 1998* (Cth) s 3 ('external reporting standards').

[105] *Charter of Budget Honesty Act 1998* (Cth) s 3 ('GFS Australia').

The relevant publications then define the 'General Government Sector' as the '[i]nstitutional sector comprising all government units and non-profit institutions controlled and mainly financed by government'.[106] Before the 2008-2009 year the Budget included financial statements prepared according to the Australian Bureau of Statistics' (ABS) accrual Government Finance Statistics (GFS) framework and Australian Accounting Standards (AAS).[107] Since then the Budget has provided a single set of financial statements that comply with the Australian Accounting Standards Board's *Whole of Government and General Government Sector Financial Reporting* (AASB 1049).[108] The distinctions drawn by this accounting standard set the bounds of the Budget:

> For GFS purposes, a government is regarded as comprising three sectors: the GGS, the PNFC [Public Non-financial Corporations] sector and the PFC [Public Financial Corporations] sector. Given its non-market nature and its important role as the vehicle by which a government implements its fiscal policy, it is useful to distinguish the GGS from the other, more market oriented, government sectors. The GGS consists of all government units and non-profit institutions controlled and mainly financed by government. Government units are legal entities established by political processes that have legislative, judicial, or executive authority over other units and which provide goods and services to the community or to individuals on a nonmarket basis; and redistribute income and wealth by means of taxes and other compulsory transfers. Non-profit institutions are created for the purpose of producing or distributing goods and services but are not permitted to be a source of income, profit or other financial gain for the government. The PNFC sector and PFC sector comprise government controlled entities that produce goods and services for the market and may be a source of income, profit or other financial gain to the government. They typically transact with outside consumers, frequently at arm's length in contestable markets.[109]

In addition to these definitions, the Australian, State and Territory governments have also agreed to a uniform reporting framework: the *Accrual Uniform Presentation Framework* (UPF) 'for the presentation of government financial information on a basis broadly consistent with AASB 1049'.[110] This was agreed at the Australian Loan Council in March 2000 and sets out 'core' financial information to be included in budget papers so that comparisons across governments might be made.[111]

6.4 Intergovernmental transfers

A central part of the Budget are allocating and accounting for intergovernmental transfers – amounts paid by the Commonwealth to the States, Territories and local councils – detailed in *Appropriation Act No 2*.[112] The amounts transferred to States and Territories used to be either by general financial assistance grants or special purpose payments (tied grants).[113] These amounts are now governed by the COAG *Intergovernmental Agreement on Federal Financial Relations* that provides in part:

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[106] See, for example, Australian Bureau of Statistics, *Australian System of Government Finance Statistics: Concepts, Sources and Methods*, 5514.0.55.001 (September 2005) 'Glossary' ('General Government Sector').

[107] See Department of Finance and Deregulation, *Budget Strategy and Outlook*, Budget Paper No 1 2010-11 (2010) pp 9-27-9-28; Department of Finance and Deregulation, *Budget Strategy and Outlook*, Budget Paper No 1 2009-10 (2009) p 9-29. See also Department of Finance and Deregulation, *Budget Strategy and Outlook*, Budget Paper No 1 2008-09 (2009) p 3-19.

[108] See Department of Finance and Deregulation, *Budget Strategy and Outlook*, Budget Paper No 1 2010-11 (2010) pp 9-27-9-28; Department of Finance and Deregulation, *Budget Strategy and Outlook*, Budget Paper No 1 2009-10 (2009) p 9-29.

[109] Australian Accounting Standards Board, *Whole of Government and General Government Sector Financial* Reporting, AASB 1049 (2007) pp 9-10.

[110] Department of Finance and Deregulation, *Budget Strategy and Outlook*, Budget Paper No 1 2010-11 (2010) p 9-1; Department of Finance and Deregulation, *Budget Strategy and Outlook*, Budget Paper No 1 2009-10 (2009) p 9-1.

[111] See Department of the Treasury, *Accrual Uniform Presentation Framework for the Presentation of Uniform Financial Information by Commonwealth, State and Territory Governments* (2000) p 1.

[112] The distribution of amounts to States and their debts was a critical part of the constitutional compromise and formed part of the explicit outcome: see *Constitution* ss 93, 94, 95, 96 and 105 (and 105A).

[113] For an overview of the evolving intergovernmental financial relations and institutions see, generally, R Burns, *Intergovernmental Fiscal Transfers: Canadian and Australian Experiences*, Centre for Research on Federal Financial Relations Research Monograph No 22 (1977) and the publications set out therein; R Mathews and W Jay, *Federal Finance: Intergovernmental Financial Relations in Australia Since Federation* (1972).

19. The Commonwealth commits to the provision of on going financial support for the States' and Territories' service delivery efforts, through:
    (a) general revenue assistance, including the on going provision of GST payments, to be used by the States and Territories for any purpose;
    (b) National Specific Purpose Payments (SPPs) to be spent in the key service delivery sectors; and
    (c) National Partnership payments to support the delivery of specified outputs or projects, to facilitate reforms or to reward those jurisdictions that deliver on nationally significant reforms.
20. National SPPs may be associated with National Agreements, but there is no provision for National SPPs to be withheld in the case of a jurisdiction not meeting a performance benchmark specified in a National Agreement.
21. National Agreements will not include financial or other input controls imposed on service delivery by the States and Territories.
22. The Parties agree to review periodically, and at least every five years, the level of Commonwealth funding support to ensure its on going adequacy.
23. All intergovernmental financial transfers other than for Commonwealth own purpose expenses will be subject to this Agreement. However, Commonwealth own purpose expenses may form part of National Agreements or National Partnerships where they contribute to mutually agreed objectives.[114]

The new arrangements starting on 1 January 2009 were to address 'the inefficient, complex and dysfunctional system of grants that has plagued areas of joint Commonwealth and state involvement in the delivery of services for decades'.[115] Most payments to States and Territories are now made according to the *Federal Financial Relations Act 2009* (Cth) with the 'object':

> The object of this Act is to provide ongoing financial support for the delivery of services by the States, through:
> (a) general revenue assistance, including the provision of GST revenue grants, to be used by the States for any purpose; and
> (b) national specific purpose payments, to be spent by the States on certain service delivery sectors; and
> (c) national partnership payments, to:
> (i) support the delivery by the States of specified outputs or projects; or
> (ii) facilitate reforms by the States; or
> (iii) reward the States for nationally significant reforms.[116]

Payments are made to the States and Territories through 'COAG Reform Fund', being a 'Special Account' established by the *COAG Reform Fund Act 2008* (Cth).[117] The *COAG Reform Fund Act 2008* (Cth) also sets out the terms and conditions for the payments,[118] and COAG itself has developed a number of templates and agreements putting arrangements into effect.[119] The 'COAG Reform Fund' as a 'Special Account' is a standing appropriation[120] and the credits of amounts in these accounts are set out in the Budget papers (Department of the Treasury Portfolio Budget Statements and Budget Paper No 3).[121] The form and content of these intergovernmental transfers are detailed in the Budget Papers (usually Budget Paper No 3):

> … presents information on the Commonwealth's financial relations with State, Territory and local governments. This includes information on payments for specific purposes, GST payments and other general revenue assistance,

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[114] *Intergovernmental Agreement on Federal Financial Relations* (2008) cls 19-23. See also Council of Australian Governments, *Communiqué*, 29 November 2008.
[115] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 2008, p 1103 (Wayne Swan, Treasurer).
[116] *Federal Financial Relations Act 2009* (Cth) s 3.
[117] *CoAG Reform Fund Act 2008* (Cth) s 5; *Financial Management and Accountability Act 1997* (Cth) s 21.
[118] *CoAG Reform Fund Act 2008* (Cth) s 7.
[119] See, for example, Council of Australian Governments, *Intergovernmental Agreement on Federal Financial Relations* (2008) Appendix E. The agreements in place include: *National Healthcare Agreement*, *National Education Agreement*, *National Agreement for Skills and Workforce Development*, *National Disability Agreement*, *National Affordable Housing Agreement* and *National Indigenous Reform Agreement*: see Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2009-10 (2009) pp 23-106.
[120] See *Financial Management and Accountability Act 1997* (Cth) s 21(1); *Federal Financial Relations Act 2009* (Cth) s 21.
[121] See, for example, Department of the Treasury, *Portfolio Budget Statements 2009-10*, Budget Related Paper No 1.17 (2009) pp 26-32. See also Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2009-10 (2009).

> as well as an overview of the reform agenda of the Council of Australian Governments and analysis of fiscal developments in the public sector.[122]

The main purpose of these intergovernmental transfers is to address the 'vertical fiscal imbalance/equalisation' and the 'horizontal fiscal imbalance/equalisation' between the parts of the Federation. That is:

> Australia's federal relations are characterised by three broad features:
> - the financial arrangements are influenced by the large expenditure responsibilities of the States relative to their revenue capacities, so that they rely on transfers from the Commonwealth – referred to as *vertical fiscal imbalance*;
> - the States have different capacities to raise revenue and deliver services – referred to as *horizontal fiscal imbalance*; and
> - overlapping roles and responsibilities in many areas of government activity have led to areas of activity where regulation or services remain fragmented, with duplication of activities, lack of coordination and blurred accountabilities (emphasis added).[123]

The intergovernmental transfers redress these imbalances through equalisation payments to reflect revenue capacities and/or expenditure capacities and ensure all Australians have access to like governmental goods and services. The quantum of payments is made, in part, according to recommendations of the Commonwealth Grants Commission as envisioned by the *Constitution* s 96[124] and the evolving overarching framework for the Commonwealth's financial relations with the States and Territories.[125]

6.5 Outcomes and outputs/programs framework (appropriations)

The outcomes and outputs/programs framework was introduced in the Federal Budget 1999 and coincided with the adoption of the accrual budgeting in the *Financial Management Legislation Amendment Act 1999* (Cth).[126] The purpose of the framework was to impose 'a means of structuring corporate governance and management arrangements and reporting on planned and actual performance' taking into account that 'agencies and their ministers have considerable scope for adopting specific structures and arrangements that suit their circumstances'.[127] In other words, to improve public sector corporate governance through devolved responsibility and at the same time enhanced public accountability.[128] At its heart was the imperative to establish performance benchmarks based on performance indicators of efficiency of agency operations and cost effectiveness of the outputs/programs delivered:[129]

> … performance indicators are developed to allow scrutiny of effectiveness (ie the impact of the outputs and administered items on outcomes) and efficiency (especially in terms of the application of administered items and the price, quality and quantity of outputs) and to enable the system to be further developed to improve performance and accountability for results.[130]

The outcomes and outputs/programs framework specifically addresses what the government wants to achieve ('outcomes'), how that is to be done ('outputs' and 'administered items'), and how those

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[122] Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2009-10 (2009) p iii; Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2008-09 (2008) p iii.
[123] Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2008-09 (2008) p 4.
[124] See *Commonwealth Grants Commission Act 1973* (Cth).
[125] See Council of Australian Governments, *Communiqué*, 29 November 2008;
[126] See also Department of Finance and Administration, *Agency Resourcing 1999-2000*, Budget Paper No 4 (1999) pp 1-2. See also Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (2007) pp 37-41. See also Michael Vertigan, *Review of Budget Estimates Production Arrangements* (1999); Rose Verspaandonk, *Accrual Budgeting-State of Play*, Parliamentary Library Research Note 30 (2000).
[127] Department of Finance and Administration, *The Outcomes & Outputs Framework: Guidance Document* (2000) p 4.
[128] Department of Finance and Administration, *The Outcomes & Outputs Framework: Guidance Document* (2000) p 4.
[129] See also Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (2007) p 38; Australian National Audit Office, *Annual Performance Reporting*, Audit Report No 11 (2003) pp 27-35.
[130] Department of Finance and Administration, *The Outcomes & Outputs Framework: Guidance Document* (2000) p 5.

administering the outcomes can know if it has been successful ('performance reporting').[131] 'Outputs' and 'administered items' are identified separately to reflect their different accountability requirements:[132] 'administered items' are those resources administered by the agency on behalf of the Australian Government that contribute to a specified outcome,[133] meanwhile, 'outputs' are those resources controlled by the agency to produce the identified products and services (also called 'departmental items').[134] Put another way, the 'outcomes' address the *Constitution*'s requirement that there be an appropriation law identifying a Commonwealth purpose. Meanwhile, the 'outputs' (and 'administered items') set out in the *Portfolio Budget Statements* (and the *Portfolio Additional Estimates Statements*) accompanying the appropriation laws[135] provide more information on what has been appropriated within the particular outcomes together with relevant performance targets:[136] '[o]utcomes are the intended effects of government programmes, whereas outputs – the goods and services delivered by government – are the means of achieving those outcomes'.[137]

At its most basic, the outcomes/outputs/programs framework:

- government (through its ministers and with the assistance of relevant agencies) specifies the outcomes it is seeking in a given area;
- these outcomes are specified in terms of the impact government is aiming to have on some aspect of society (eg education), the economy (eg exports) or the national interest (eg defence);
- Parliament appropriates funds to allow the government to achieve these outcomes through administered items and departmental outputs;
- items such as grants, transfers and benefit payments are administered on the government's behalf by agencies, with a view to maximising their contribution to the specified outcomes;
- agencies specify and manage their outputs to maximise their contribution to the achievement of the Government's desired outcomes;

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131 Department of Finance and Administration, *Agency Resourcing 2007-2008*, Budget Paper No 4 (2007) pp 3-4. See also Finance and Public Administration Legislative and General Purpose Committee, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007); Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (2007); Joint Committee of Public Accounts and Audit, *Review of Accrual Budget Documentation*, Report No 388 (2002); Finance and Public Administration Legislation Committee, Senate, *The Format of the Portfolio Budget Statements: Third Report* (2000); Finance and Public Administration Legislation Committee, Senate, *The Format of the Portfolio Budget Statements: Second Report* (1999); Department of Finance and Administration, *Specifying Outcomes and Outputs: The Commonwealth's Accrual-based Outcomes and Outputs Framework and Outcomes and Outputs – Guidance for Review* (1999); Finance and Public Administration Legislation Committee, Senate, *Report on the Format of the Portfolio Budget Statements* (1997).

132 See the amended *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2009* (Cth) o 3, sch 1.

133 Department of Finance and Administration, *The Outcomes & Outputs Framework: Guidance Document* (2000) p 16. 'Those items that an agency does not control but over which it has management responsibility on behalf of the Government and which are subject to prescriptive rules or conditions established by legislation, or Australian Government policy, in order to achieve Australian Government outcomes': amended *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2009* (Cth) o 3, sch 1.

134 Department of Finance and Administration, *The Outcomes & Outputs Framework: Guidance Document* (2000) p 16. 'Those items which the entity controls that are applied to the production of the entity's own outputs': amended *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2009* (Cth) o 3, sch 1.

135 Notably, the *Portfolio Budget Statements* and *Portfolio Additional Estimates Statements* are Budget Related Papers and are declared by the Appropriation Bills to be 'relevant documents' for the interpretation of the Bills: *Appropriation Act (No 1) 2006-2007 2006* (Cth) s 4 and *Appropriation Act (No 5) 2006-2007 2007* (Cth) s 4.

136 See *Combet v Commonwealth* (2005) 224 CLR 494 at 529-530 (Gleeson CJ), 542-550 (McHugh J), 565-568 (Gummow, Hayne, Callinan and Heydon JJ), 611-615 (Kirby J); Australian National Audit Office and Department of Finance and Administration, *Guide on Annual Performance Reporting*, Better Practice Guide (2004); Australian National Audit Office, *Annual Performance Reporting*, Audit Report No 11 (2003); Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Better Practice Guide (2002); Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Audit Report No 18 (2001).

137 *Combet v Commonwealth* (2005) 224 CLR 494 at 523 (Gleeson CJ) citing Webber D, 'Managing the Public's Money: From Outputs to Outcomes – and Beyond' (2004) 4(2) *OECD Journal on Budgeting* 101 at 109 citing Brumby J and Robinson M, 'Performance Budgeting, an Overview', a paper prepared for the International Seminar on Performance Budgeting organised by the IMF and Brazilian Ministry of Planning, Budget and Management in March 2004.

- performance indicators are developed to allow scrutiny of effectiveness (i.e., the impact of the outputs and administered items on outcomes) and efficiency (especially in terms of the application of administered items and the price, quality and quantity of outputs) and to enable the system to be further developed to improve performance and accountability for results.[138]

From the Federal Budget 2009-2010 the outcome and output were 'transitioned' to outcomes and programs. This followed the 'Operation Sunlight' review and some earlier criticism from Parliamentary committees and the Auditor-General.[139] The effect of these reforms, however, appears to be quite limited, and does not appear to significantly affect the form of presentation:[140]

> As part of the government's implementation of the Operation Sunlight reforms, the Portfolio Budget Statements (PBS) for the 2009-10 financial year feature program-based rather than output-based reporting. This means that all agency outcome statements have been reviewed and replaced with statements that are more specific and targeted.[141]

The process has, however, promised greater levels of relevant and useful information about agency performance:

> The transition to greater program reporting has provided the opportunity to review the functional classification of expenditure by program including, where appropriate, ensuring a one-for-one relationship between programs and sub-functions. This review has resulted in an improved allocation of expenditure by function, improving the robustness of functional expenses data and the consistency of reporting across government.[142]

The policy in practice of outcomes and programs has been to re-format the form and content of *Portfolio Budget Statements* and *Annual Reports*: 'Improvements to outcome statements, along with the introduction of program reporting, will enhance the transparency and accountability of government spending through an increased emphasis on performance management, measurement and reporting'.[143] The outcome and program division are:

(a) *Outcome* – 'Outcome statements articulate Government objectives and serve three main purposes within the financial framework:
- to explain the purposes for which annual appropriations are approved by the Parliament for use by agencies;
- to provide a basis for annual budgeting, including financial reporting against the use of appropriated funds and the control thereof; and
- to measure and assess agency and program non-financial performance in contributing to Government policy objectives'.[144]

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[138] Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) p 9. See also Department of Finance and Administration, *The Outcomes and Outputs Framework Guidance* (2000) p 5.

[139] See Andrew Murray, *Review of Operation Sunlight: Overhauling Budget Transparency* (2008) pp 24-26; Finance and Public Administration Committee, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 50-52; Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 2006-07 (2007) pp 90-94. See also Department of Finance and Deregulation, *Government Response to the Review of Operation Sunlight: Overhauling Budget Transparency* (2008) p 6: 'Portfolio Budget Statements are to include financial and non-financial information on agency programs with effect from the 2009-10 Budget. The Senate Finance and Public Administration Committee's model has been considered and different options for the presentation of agency level program information will be discussed with relevant Parliamentary Committees before a final format is determined'.

[140] See Minister for Finance and Deregulation, *Budget Strategy and Outlook*, Budget Paper No 1 (2009) pp 6-9-6-10.

[141] Finance and Public Administration Legislation Committee, Senate, *Annual Reports (No 2 of 2009)* (2009) p 3. See also Richard Webb, 'Budget Transparency – Operation Sunlight' in Roxanne Missingham, *Budget Review 2009-10*, Department of Parliamentary Services Research Paper No 33 2008-09 (2009) p 16.

[142] Minister for Finance and Deregulation, *Budget Strategy and Outlook*, Budget Paper No 1 (2009) p 6-9.

[143] Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) p 6.

[144] Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) pp 8-9.

Further, an outcome statement has the form of '[Intended result] for [target group] through [actions]' or '[Intended result] through [actions] for [target group]'.[145] The final form of the outcome statement is negotiated between the agency and the Department of Finance and Deregulation addressing the requirement that the statement contain sufficient clarity of purpose' to be a valid appropriation (discussed in the next chapter).[146]

(b) *Program* – 'Commonwealth programs deliver benefits, services or transfer payments to individuals, industry/business or the community as a whole and are the primary vehicles for government agencies to achieve the intended results of their outcome statements'.[147] A program has the following characteristics:

1. Activities or group of activities that contribute to the intended results of Government (as specified in agency outcome statements)
   - Programs should be structured around contributing to the intended results of the respective outcome statement.
   - Where necessary and appropriate, groupings of existing activities (either administered or departmental) can be grouped to form a more substantial program.
2. Ongoing in nature (minimum span of 5 years)
   - Commonwealth programs are to be ongoing in nature to allow for a consistent list at the whole of government level and for continuity in agency reporting.
3. Is material in size (eg >$50-100m) in annual expenditure
   - Agencies should use $50-100m as a guide to the minimum financial materiality of program annual expenses to ensure that the Commonwealth Program List remains manageable and relevant to whole of government program analysis and budgeting.
   - However, financial materiality is not the sole driver of agency program structures.
4. Maps to a single Government Finance Statistics (GFS) sub-function and single government outcome statement (see glossary for information on GFS sub-functions)
   - Mapping programs to a single sub-function strengthens the whole of government medium to long-term fiscal trend information provided to government and the Parliament.
   - Programs are required to map to a single outcome to ensure appropriation and performance reporting frameworks are aligned.
5. Represents a particular interest to the Government, Parliament, and/ or the public
   - In some instances, areas of agency activity may not meet one or more of the four criteria outlined above, but still represent an area of activity that requires visibility, to the Government, Parliament or the public.[148]

A further distinction is between:

(i) *Administered programs* – 'Typically administered programs involve a transfer payment, benefit, grant or service provided to individuals or defined sections of the community and are often funded through special appropriations. Administered programs are also typically defined in legislation or through government criteria. The responsible agency has limited, if any, discretion in the allocation of resources or the purpose and objectives of the program. In addition, annual administered appropriations are tied to outcomes in the appropriation bills'.[149]

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[145] Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) p 9.
[146] Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) pp 10-11.
[147] Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) p 12.
[148] Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) p 13.
[149] Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) p 14.

(ii) *Departmental programs* – 'Departmental programs operate within general government policy, but the Chief Executive Officer has a greater level of discretion in the allocation of resources within the agency to meet government objectives, taking into account changing circumstances and requirements'.[150]

Like the outcome statement, the form and content of programs are negotiated between the agency and the Department of Finance and Deregulation.[151]

6.6 Budget cycle

The Budget is the culmination of the 'budget cycle' taking place within the Executive. This cycle starts with the Australian Government determining its expenditure, and setting its expenditure priorities, and concludes with the annual report setting out the expenditure against performance.[152] The central agencies of the Department of the Treasury, the Department of Finance and Deregulation and the Department of the Department of the Prime Minister and Cabinet are key institutions in the budget cycle,[153] and responsible for the following areas:[154]

(a) *The Department of the Treasury* – Articulates budget policy and the policy associated with revenues and money as part of its broader economic policy role, and in particular, its role in delivering policy about fiscal strategy, taxation, intergovernmental transfers, and so on.

(b) *The Department of Finance and Deregulation* – Articulates policy addressing the financial, allocative and technical efficiency of the budget, and in particular, the role of amassing estimates data and information, spending proposals, budget process and the construction of budget documentation.

(c) *The Department of the Prime Minister and Cabinet* – Overseeing the fiscal strategy and budget formulation, and linking the budget to the broader governmental and political arenas.

Important events are Agencies' updating their expenditure estimates in October for the preparation of the *Mid-year Economic and Fiscal Outlook*, then in early February the preparations for the *Expenditure Review Committee*, then in April the preparation of the Budget and finally its delivery in May, and in August, the preparation of the annual reports. The significant obligations are:

(a) The *Charter of Budget Honesty Act 1998* (Cth) s 3(1) and sch 1 (s 14) requires the Treasurer to publicly release and table a *Mid-year Economic and Fiscal Outlook* report by the end of January in each year, or within 6 months after the last budget, whichever is later. The purpose of this report is to provide updated information about the Government's expenditures against the expenditures set out in the Budget Papers (Budget Paper No 1). The *Charter of Budget Honesty Act 1998* (Cth) s 3(1) and sch 1 (ss 18-19) requires the tabling in Parliament of a *Final Budget Outcome* report covering the Commonwealth budget sector and Commonwealth general government sector fiscal outcomes for the financial year.

(b) The *Expenditure Review Committee* is a Cabinet sub-committee made up of the Prime Minister and some of the other senior ministers in Cabinet. This committee considers the major new

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[150] Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) p 14.

[151] Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) p 16.

[152] For a recent overview see Jón Blöndal, Daniel Bergvall, Ian Hawkesworth and Rex Deighton-Smith, 'Budgeting in Australia' (2008) 8 *OECD Journal on Budgeting* 133 at 141-145 and 156-161.

[153] See John Wanna, Joanne Kelly and John Forster, *Managing Public Expenditure in Australia* (2000) pp 41-47.

[154] See also Jón Blöndal, Daniel Bergvall, Ian Hawkesworth and Rex Deighton-Smith, 'Budgeting in Australia' (2008) 8 *OECD Journal on Budgeting* 133 at 143-145.

policy, expenditure and savings proposals, making recommendations to Cabinet that then sets the budget priorities for developing the Budget. The *Expenditure Review Committee* is assisted by information and data provided by a Strategic Budget Committee (formerly called the Senior Minister's Review), Portfolio Budget Submissions, public budget submissions, and so on.

(c) When an election is called, the *Charter of Budget Honesty Act 1998* (Cth) s 3(1) and sch 1 (s 22) requires, within ten days of the issue of the writ for a general election, the Secretaries to the Department of the Treasury and the Department of Finance and Deregulation to release a report updating the economic and expenditure outlook in the *Pre-election Economic and Fiscal Outlook* report.

(d) The presentation of an *Annual Report* by each Agency according to the *Public Service Act 1999* (Cth) and each body under the *Commonwealth Authorities and Companies Act 1997* (Cth).

With the public disclosure of the Budget by the Treasurer in May, the processes of the Parliament take over. First the Budget documents are placed onto the Parliamentary record by being tabled by the Treasurer. The Appropriation Bills and accompanying documents are referred to Senate Legislation Committees for inquiry and report back to the Senate. The Appropriation Bills are then formally considered by the Parliamentary chambers and eventually passed as laws. The key components of the Budget papers presented to Parliament vary from year to year, evolving with the process albeit there are some consistently presented documents.

6.7 Budget documents

The Budget documents are essentially the Appropriation Bills and other Budget documents. The Appropriation Bills are classified as:

(a) *Appropriation Act (No 1)* – The appropriations of the CRF for the purposes of the 'ordinary annual services of government'. This distinction is necessary to comply with the *Constitution* ss 53 and 54 that prevents the Senate from amending proposed laws appropriating fund for the 'ordinary annual services of government'. These appropriations are according to the distinction between administered and 'departmental' expenses for the Bill provides for the appropriation of specified amounts for Australian Government agencies (being those under the *Financial Management and Accountability Act 1997* (Cth) and the High Court of Australia) and bodies under the *Commonwealth Authorities and Companies Act 1997* (Cth).

(b) *Appropriation Act (No 2)* – The appropriations of the CRF for the purposes *other than* the 'ordinary annual services of government'. These appropriations are according to the distinction between administered and 'departmental' expenses for the Bill provides for the appropriation of specified amounts for Australian Government agencies (being those under the *Financial Management and Accountability Act 1997* (Cth) and the High Court of Australia) and bodies under the *Commonwealth Authorities and Companies Act 1997* (Cth).

(c) *Appropriation (Parliamentary Departments) Act (No 1)* – The appropriations of the CRF for the expenditure of the Parliamentary Departments. Appropriations for the Parliamentary Departments *are not* for the 'ordinary annual services of the government'.

(d) *Appropriation Act (No 3), Appropriation Act (No 4) and Appropriation (Parliamentary Departments) Act (No 2)* – These are Appropriation Bills that are counterparts to those introduced as part of the Budget and deal with appropriations later in the year addressing additional funding commitments.

(e) *Other Appropriation Bills* – There is not limit to the number of Appropriation Bills that may be presented, and the Australian Government often includes additional Appropriation Bills either with the Budget or at other times during the year.

(f) *Supply Bills* – Supply Bill were the Bills used to make interim provision for expenditure before the Appropriation Bills were considered in Parliament as part of the annual Budget. Supply Bills are no longer a part of the normal Budget arrangements and have been replaced to some extent by the additional appropriations (such as *Appropriation Act (No 3), Appropriation Act (No 4)* and *Appropriation (Parliamentary Departments) Act (No 2)*).

The other Budget documents include:

(a) *The Budget speech* – This is the Second Reading speech accompanying *Appropriation Act (No 1)*. The speech usually provides an overview of the Budget and some insight into the Executive's expenditure priorities.

(b) *Budget at a Glance and Budget Overview* – These documents provide an overview of key budget aggregates and the Executive's expenditure priorities.

(c) *Budget Paper No 1* – This document provides a broad overview of the Budget within the context of the broader economy and includes the *Charter of Budget Honesty Act 1998* (Cth) fiscal strategy, economic and fiscal outlook, and so on, in a number of 'statements'.

(d) *Budget Paper No 2* – This document details the Budget measures according to portfolio and provides details about revenue, expense and capital measures. Most importantly, this document provides details about the changes in revenue, expense and capital measures by portfolio.

(e) *Budget Paper No 3* – This document details the transfer payments from the Commonwealth to the States, Territories and local governments, and in particular, the amounts of Specific Purpose Payments.

(f) *Budget Paper No 4* – This document provides a consolidation of information about the resourcing including estimates for special appropriations and Special Accounts (appropriations for a designated purpose).

(g) *Portfolio Budget Statements (PBS)* – These documents are intended to inform Senators and Members of Parliament about the proposed allocation of resources to government outcomes by Agencies within the portfolio. Significantly, the document sets out the allocation of the Agency resources from the appropriations, the outcome and planned performance including the strategy and outputs/programs. These statements include the presentation of intended expenditure on an accrual and cash basis.[155] The critical aspect of this document is the 'forward estimates'. These are a projection on expenditure in following years (out years), with the first year's forward estimate forming the basis of the following year's budget allocation. Any changes therefore need to be explained and any new expenditure is identifiable. This is significant as these forward estimates include *all* appropriations,

[155] Notably, there is usually little material difference between the accrual and cash amounts because of the limited capital outlays by the Commonwealth, those outlays being made at the State and Local Council level: see Jón Blöndal, Daniel Bergvall, Ian Hawkesworth and Rex Deighton-Smith, 'Budgeting in Australia' (2008) 8 *OECD Journal on Budgeting* 133 at 166-167.

including the plethora of standing appropriations, and provide the primary means of accountability, responsibility and transparency for the Budget and standing appropriations.[156]

(h) *Portfolio Supplementary Estimates Statements*, *Portfolio Additional Estimates Statements* and *Portfolio Supplementary Additional Estimates Statements*, and so on – These document detail supplementary appropriation measures generally in a form like the PBS.

(i) *Ministerial Statements* – These are statements made available by Ministers addressing their portfolio or specific issues that have been subject to appropriation.

There are a range of other documents addressing the Budget that provide information about the outcomes from previous budgets, such as the *Mid-Year Economic and Fiscal Outlook*, the *Final Budget Outcome*, and so on. There are no formal requirements for the form and content of most of the Budget documents. They, like the Budget process, are evolving over time and changing to meet the specific needs of the time.

6.8 Portfolio Budget Statements (PBS)

The intended purpose of the *Portfolio Budget Statements* (PBS) (and similar statements like *Portfolio Additional Estimates Statements*, and so on) is to 'provide information, explanation and justification to enable Parliament to understand the purpose of each outcome proposed in the [Appropriation] Bills'.[157] They have, however, a more significant function: the Appropriation Acts declare the *Portfolio Budget Statements* (PBS) to be a relevant documents for the purposes of s 15AB of the *Acts Interpretation Act 1901* (Cth).[158] This means that the *Portfolio Budget Statements* (PBS) are 'relevant documents' as extrinsic materials in interpreting the Appropriation Acts.[159] This distinction is important because it means 'the information in the PBSs is not binding, as Parliament does not vote on it',[160] and so the Appropriation Acts *are* the actual appropriation law while the PBSs is merely authoritative.[161]

The PBSs are structured to be relevant and strategic, clear and concise, performance focused and coherent and consistent according to the divisions:[162]

(a) *Section One: Agency Overview and Resources* – These set out a high level overview of the portfolio, its agencies, its goals, its structure and the available resources.[163]

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[156] Notably, the forward estimates are also addressed in the *Mid-Year Economic and Fiscal Outlook*: see, for example, Department of the Treasury, *Mid-Year Economic and Fiscal Outlook 2009-10* (2009) pp 59-63.

[157] Department of Finance and Deregulation, *Portfolio Budget Statements 2009-10*, Budget Related Paper No 1.8 (2009) p vii.

[158] See *Appropriation Act (No 1) 2009-2010* (Cth) s 4; *Appropriation Act (No 2) 2009-2010* (Cth) s 4; *Appropriation (Parliamentary Departments) Act (No 1) 2009-2010* (Cth) s 4; *Appropriation Act (No 3) 2009-2010* (Cth) s 4; *Appropriation Act (No 4) 2009-2010* (Cth) s 4;

[159] *Acts Interpretation Act 1901* (Cth) s 15AB. See also Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) p 20; Finance and Public Administration Committee, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 59-60; *Combet v Commonwealth* (2005) 224 CLR 494 at 527 (Gleeson CJ), 564 (Gummow, Hayne, Callinan and Heydon JJ), 586 (Kirby J).

[160] Bram Scheers, Miekatrien Sterck and Geert Bouckaert, 'Lessons from Australian and British Reforms in Results-oriented Financial Management' (2007) 5 *OECD Journal on Budgeting* 133 at 139.

[161] See Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) p 20.

[162] Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) p 19.

[163] See Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) pp 24-44.

(b) *Section Two: Outcomes and Planned Performance* – These set out details about the outcomes and outputs/programs of the agency, its resourcing, its deliverables and its performance information.[164]

(c) *Section Three: Explanatory Tables and Budgeted Financial Statements* – These set out the financial accounting information about the agency's operations over the Budget period and for the three forward years.[165]

There remains ongoing concern about the form and content of the PBSs.[166] They are, however, an evolving project:

> They are evolving, however, and may eventually reach a point where they can more closely merge the government's aspirations for them as budgeting statements and senators' hopes for a simple, straightforward, user-friendly, yet detailed guide to the estimates.[167]

At this stage the PBSs set out in some detail the price, quality and quantity of outputs/programs that an agency will deliver, and the performance criteria to be use in demonstrating their contribution to the agency's outputs/programs.[168] Further, the PBSs provide a link between the appropriation of revenues and moneys by the Parliament and the reporting in the *Annual Reports* about the spending of those appropriated amounts.

6.9 The Budget in Parliament

In early May the Parliament sets aside time in both the Senate and House of Representatives to consider the Budget. The process is as follows:[169]

(a) *House of Representatives* – A message from the Governor-General about proposed expenditure and recommending appropriation is announced[170] and then followed by the introduction of *Appropriation Bill (No 1)* by the Treasurer. That Bill proceeds directly to the Second Reading stage and the Treasurer makes the second reading speech. After the speech the Budget documents are tabled. After this the Minister for Finance and Deregulation introduces and presents the second readings for the *Appropriation Bill (No 2)* and *Appropriation (Parliamentary Departments) Act (No 1)*. The debate is then adjourned and resumed later in the week with a formal opportunity for the opposition to make the next second reading speech. After this the Bill proceeds like any other Bill through the Second Reading/Main Committee where it is considered in detail before a Third Reading and then transmission to the Senate. As a matter of practice the Appropriation Bills are subject to limited scrutiny because of the

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164 See Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) pp 48-66.

165 See Department of Finance and Deregulation, *Portfolio Budget Statements Constructors Kit: Officer Instruction for Producing Portfolio Budget Statements and the Outcomes and Programs Framework* (2009) pp 68-86.

166 See, for examples, Finance and Public Administration Committee, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 59-60; Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 2006-2007 (2007) pp 84-94; Management Advisory Committee, Connecting Government: Whole of Government Responses to Australia's Priority Challenges (2004) pp 75-88; Joint Committee of Public Accounts and Audit, *Review of the Accrual Budget Documentation*, Report 388 (2002); Finance and Public Administration Legislation Committee, Senate, *The Format of the Portfolio Budget Statements: Third Report* (2000); Finance and Public Administration Legislation Committee, Senate, *The Format of the Portfolio Budget Statements: Second Report* (1999); Finance and Public Administration Legislation Committee, Senate, *The Format of the Portfolio Budget Statements* (1997).

167 Finance and Public Administration Committee, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) p 43.

168 See also Finance and Public Administration Legislation Committee, Senate, *The Format of the Portfolio Budget Statements* (1997).

169 See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) pp 271-318; Ian Harris, *House of Representatives Practice* (5th ed, 2005) pp 407-429.

170 See *Constitution* s 56; *House of Representatives Standing Orders* o 180.

urgency that they be passed in time for the start of the financial year in July and because Members may only amend an amount by reducing or omitting the amount.[171]

(b) *Senate* – The documents presented by the Treasurer and the Minister for Finance and Deregulation in the House of Representatives are tabled in the Senate following the Treasurer's second reading speech. The Budget proposals are then referred to the Senate committees according to their portfolio for inquiry (Senate Estimates). The Senate committees report on their findings and suggest possible amendments. The Bills eventually arrive from the House of Representatives and are considered by the Senate in the same was as every other Bill, except that requests for an amendment may be made at *any* stage.[172] After the second reading debates the Senate considers the Senate committee reports and their suggested amendments before the Third Reading and either referred back to the House of Representatives or to the Governor-General for assent.

6.10 The Budget outcomes and reporting

There are a range of reports that stem from the Budget providing data and information about the uses and expenditure of the Australian Government's resources:

(a) The *Charter of Budget Honesty Act 1998* (Cth) requires that the Australian Government provide a *Fiscal Strategy Statement* 'at or before the time of the Government's first budget'[173] and 'at the time of each of the Government's subsequent budgets'.[174] This statement is intended 'to increase public awareness of the Government's fiscal strategy and to establish a benchmark for evaluating the Government's conduct of fiscal policy'.[175] The statement is required to: 'specify the Government's long-term fiscal objectives within which shorter-term fiscal policy will be framed', 'explain the broad strategic priorities on which the budget is or will be based', 'specify the key fiscal measures that the Government considers important and against which fiscal policy will be set and assessed', 'specify, for the budget year and the following 3 financial years: (i) the Government's fiscal objectives and targets; and (ii) the expected outcomes for the specified key fiscal measures', 'explain how the fiscal objectives and strategic priorities … relate to the principles of sound fiscal management', 'specify fiscal policy actions taken or to be taken by the Government that are temporary in nature, adopted for the purpose of moderating cyclical fluctuations in economic activity, and indicate the process for their reversal', and 'explain broadly the reporting basis on which subsequent Government fiscal reports will be prepared'.[176]

(b) The *Charter of Budget Honesty Act 1998* (Cth) requires that the Australian Government provide a number of annual reports:

(i) *Budget Economic and Fiscal Outlook Report* – This is made available at the time of the Budget,[177] and is intended 'to provide information to allow the assessment of the Government's fiscal performance against the fiscal strategy set out in its current fiscal strategy statement'.[178] The report is required to contain the following information: 'Commonwealth budget sector and Commonwealth general government sector fiscal estimates for the budget year and the following 3 financial years', 'the economic and other assumptions for the budget year and the following 3

[171] *House of Representatives Standing Orders* o 180(d).
[172] See *Senate Standing Orders* o 140(1).
[173] *Charter of Budget Honesty Act 1998* (Cth) s 6(1).
[174] *Charter of Budget Honesty Act 1998* (Cth) s 6(2).
[175] *Charter of Budget Honesty Act 1998* (Cth) s 6(3).
[176] *Charter of Budget Honesty Act 1998* (Cth) s 9(1).
[177] *Charter of Budget Honesty Act 1998* (Cth) s 10.
[178] *Charter of Budget Honesty Act 1998* (Cth) s 11.

financial years that have been used in preparing those fiscal estimates', 'discussion of the sensitivity of those fiscal estimates to changes in those economic and other assumptions', 'an overview of the estimated tax expenditures for the budget year and the following 3 financial years', 'a statement of the risks, quantified where feasible, that may have a material effect on the fiscal outlook, including: (i) contingent liabilities; and (ii) publicly announced Government commitments that are not yet included in the fiscal estimates …', and 'Government negotiations that have yet to be finalised'.[179]

(ii) *Mid-year Economic and Fiscal Outlook Report* – This is made available 'by the end of January in each year, or within 6 months after the last budget, whichever is later',[180] and is intended 'to provide updated information to allow the assessment of the Government's fiscal performance against the fiscal strategy set out in its current fiscal strategy statement'.[181] The report is intended to 'update key information contained in the most recent budget economic and fiscal outlook report' and 'contain a detailed statement of tax expenditures, presenting disaggregated information on tax expenditures'.[182]

(iii) *Final Budget Outcome Report* – This is made available 'no later than 3 months after the end of the financial year',[183] and contains 'Commonwealth budget sector and Commonwealth general government sector fiscal outcomes for the financial year'.[184] This report sets out a range of financial information about the previous budget and the high level outcomes from expenditures.[185]

(c) The *Charter of Budget Honesty Act 1998* (Cth) also requires that the Government provide a number of other reports:

(i) *Intergenerational report* – This report is issued every 5 years starting in 2002,[186] and is intended 'to assess the long term sustainability of current Government policies over the 40 years following the release of the report, including by taking account of the financial implications of demographic change'.[187] This report has become a means of addressing 'the long-term demographic, economic and spending projections and the implications for the sustainability of fiscal policy'.[188]

(ii) *Pre-election economic and fiscal outlook report* – This report is issued jointly by the Secretary to the Department of the Treasury and the Secretary to the Department of Finance as 'a pre-election economic and fiscal outlook report within 10 days of the issue of the writ for a general election'[189] that is intended 'to provide updated information on the economic and fiscal outlook'.[190]

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[179] *Charter of Budget Honesty Act 1998* (Cth) s 12(1).
[180] *Charter of Budget Honesty Act 1998* (Cth) s 14(1).
[181] *Charter of Budget Honesty Act 1998* (Cth) s 15.
[182] *Charter of Budget Honesty Act 1998* (Cth) s 16(1).
[183] *Charter of Budget Honesty Act 1998* (Cth) s 18(1).
[184] *Charter of Budget Honesty Act 1998* (Cth) s 19(1).
[185] See, for example, Department of Finance and Deregulation, *Final Budget Outcome 2008-09* (2009).
[186] *Charter of Budget Honesty Act 1998* (Cth) s 20(1).
[187] *Charter of Budget Honesty Act 1998* (Cth) s 21.
[188] Department of the Treasury, *Intergenerational Report 2007* (2007) p iii. See also Department of the Treasury, *Australia to 2050: Future Challenges – Intergenerational Report 2010* (2010); Department of the Treasury, *Intergenerational Report 2002-03*, Budget Paper No 5 (2002).
[189] *Charter of Budget Honesty Act 1998* (Cth) s 22.
[190] *Charter of Budget Honesty Act 1998* (Cth) s 23.

(d) The *Public Service Act 1999* (Cth) requires that the Australian Government provide a number of reports:

(i) *Annual Reports* – The 'Secretary of a Department', the 'Head of an Executive Agency' and the Public Service Commissioner are required to give a report to the Minister on their activities during the year.[191] The report is prepared according to 'guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit' (JCPAA).[192] These reports include information about the outcomes, programs, key performance information and financial statements.[193]

(ii) *State of the Service report* – As a part of the *Annual Report* about the activities of the Australian Public Service Commission.[194] Following agreement with the JCPAA in 2003, the *State of the Service Report* is submitted as a separate report together with supporting documentation.[195] The report is prepared according to 'guidelines approved on behalf of the Parliament by the [JCPAA]'.[196] The report addresses 'the activities and human resource management practices of [Australian Public Service] agencies' and 'outlines some of the key achievements and contributions agencies have made in assisting the government during this period to meet its policy objectives and achieve its stated outcomes'.[197]

(e) The *Financial Management and Accountability Act 1997* (Cth) requires that the Australian Government provide a number of statements including a monthly financial statement in a form consistent with the Budget estimates that includes information about the fiscal balance, the underlying cash balance and the net operating result for the general government sector, and annually consolidated financial statements for the Commonwealth.[198]

The intention of the reporting obligations is to enhance accountability, responsibility and transparency through a 'clear read' between the Budget documents and the subsequent reporting obligations:[199]

> [PBSs] set out the proposed allocation of resources to achieve Government outcomes. They set out performance information targets for departmental and administered programs. Annual reports report on the achievement of those targets. [PBSs] and annual reports provide the Government and the Parliament with detailed information about the actual performance of departments and forecasts of future needs and expectations. The 'clear read'

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[191] *Public Service Act 1999* (Cth) ss 44(1) (Public Service Commissioner), 63(1) (Secretary of a Department), 70(1) (Head of an Executive Agency). As a matter of policy this reporting is also applied to prescribed Agencies: *Financial Management and Accountability Act 1997* (Cth) s 5; Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010) p 1.

[192] *Public Service Act 1999* (Cth) ss 44(4) (Public Service Commissioner), 63(2) (Secretary of a Department), 70(2) (Head of an Executive Agency). See also Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010).

[193] See Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010) pp 5-14.

[194] *Public Service Act 1999* (Cth) s 44(2); *Public Service Commissioner's Directions 1999* (Cth) d 3.5(2).

[195] See Australian Public Service Commission, *State of the Service Report*, State of the Service Series 2002-03 (2003) p iii.

[196] *Public Service Act 1999* (Cth) s 44(4).

[197] Australian Public Service Commission, *State of the Service Report*, State of the Service Series 2008-09 (2009) p xiii.

[198] *Financial Management and Accountability Act 1997* (Cth) ss 54 (monthly financial statement) and 55 (consolidated financial statements). See also Department of Finance and Deregulation, *Consolidated Financial Statements for the Australian Government for the Financial Year Ended 30 June 2009* (2009).

[199] See Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010) p 3; Andrew Murray, *Review of Operation Sunlight: Overhauling Budget Transparency* (2008) pp 90-91; Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (2007) pp 77-83; Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Better Practice Guide (2002) pp 5-6; and so on. For an illustration of the relationship see, for example, Charles Lawson, 'Managerialist Influences on Granting Patents in Australia' (2008) 15 *Australian Journal of Administrative Law* 70.

> between [PBSs] and annual reports is an essential part of the accountability system that compares budgeted targets and figures to those actually achieved, and places a strong emphasis on compatibility between the two documents regarding budget and performance information.[200]

The *Annual Report* itself is a report from a *Public Service Act 1999* (Cth) 'Agency Head' to the portfolio Minister for tabling in the Parliament about that Agency's performance.[201] The *Financial Management and Accountability Act 1997* (Cth) complements these requirements by obliging the 'Chief Executive' to prepare annual financial statements (according to the *Finance Minister's Orders*),[202] and the associated Auditor-General's report,[203] to be included in that *Annual Report*.[204] In effect, the *Annual Report* is the 'key reference document'[205] that links the financial management and people management arrangements within an outcomes and outputs/programs framework set out in the *Portfolio Budget Statements* (and *Portfolio Additional Estimates Statements*) accompanying the Budget appropriations.[206]

The *Annual Report* is tabled in Parliament[207] and referred to a Senate Standing Committee[208] and a House of Representative Standing Committee.[209] These committees have the mandate to rigorously assess the *Annual Report*, although in practice, their assessments are fairly superficial.[210] Other opportunities for Parliamentary scrutiny of the Australian Government's operations, activities and expenditure proposals occurs through the JCPAA under the *Public Accounts and Audit Committee Act 1951* (Cth) and the twice yearly Senate Estimate Committee hearings.[211]

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[200] Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010) p 3.

[201] *Public Service Act 1999* (Cth) ss 44(1) (Public Service Commissioner), 63(1) (Secretary of a Department), 70(1) (Head of an Executive Agency).

[202] *Financial Management and Accountability Act 1997* (Cth) s 63; amended *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2009* (Cth).

[203] *Financial Management and Accountability Act 1997* (Cth) ss 49-51 and 54-57.

[204] *Financial Management and Accountability Act 1997* (Cth) s 57(7). This has been interpreted to mean the *Annual Report* required by the *Public Service Act 1999* (Cth) s 63(1): Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010) pp 14-15; Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Better Practice Guide (2002) p 5.

[205] Australian National Audit Office, *Annual Performance Reporting*, Audit Report No 11 (2003) p 21. See also *Senate Standing Order* 25(21); Australian National Audit Office and Department of Finance and Administration, *Guide on Annual Performance Reporting*, Better Practice Guide (2004).

[206] See Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Better Practice Guide (2002) p 5. See also Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010) pp 3-4.

[207] *Public Service Act 1999* (Cth), s 63(1).

[208] *Senate Standing Order* 25(21). See also Harry Evans, *Odgers' Australian Senate Practice* (11th ed, 2004) pp 386-387.

[209] *House of Representatives Standing Order* 215(c). See also Ian Harris (ed), *House of Representatives Practice* (5th ed, 2005) p 624.

[210] See *Senate Standing Order* 25(20)(e); *House of Representatives Standing Order* 215(c).

[211] See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) pp 360-362 and 366-371. See also Department of the Senate, *Consideration of Estimates by the Senate Committees*, Senate Brief No 5 (2006).

7. Financial arrangements

7.1 Introduction

The Australian Government's financial arrangements are structured around the *Constitution*'s finance provisions.[1] The financial transitional arrangements finally adopted in the *Constitution* provided for the Commonwealth to take over the collection and control of State customs duties and excise,[2] and then for the Commonwealth to impose uniform customs duties within two years of its establishment.[3] In the period before the Commonwealth imposed uniform customs duties the Commonwealth was required to pay monthly the balance of the States' customs duties less any expenditure.[4] During the five years after uniform customs duties were imposed, or 'until the Parliament otherwise provides', the Commonwealth was to account to the States,[5] and thereafter make payments to the States of the surplus 'on such basis as it [the Parliament] deems fair'.[6] Central to this delicate compromise was the maintenance of Parliament's authority over the Executive's future expenditure,[7] the *Constitution* providing, in part:[8]

> 81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this *Constitution*.
> …
> 83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

The financial provisions were amongst the most contentious during the Constitutional Convention debates.[9] The compromise of these debates was essentially to leave the practical implementation of the finance clauses after the transition period to future Parliaments.[10] The Parliament has willingly undertaken this task over the decades. This chapter provides an overview of the modern financial

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[1] See *Constitution* ss 81-83, 86-91, 93-97 and 105-105A. See generally Denis James, 'Federal-State Financial Relations: The Deakin Prophecy' in Geoffrey Lindell and Robert Bennett, *Parliament: The Vision in Hindsight* (2001) pp 210-248.

[2] *Constitution* s 86.

[3] *Constitution* s 88. The Commonwealth did impose uniform customs duties at 4.00 pm on 8 October 1901: *Customs Tariff Act 1902* (Cth) s 4. Notably, Western Australia levied customs duty on a reducing scale over a period of five years 'on goods passing into that State and not originally imported from beyond the limits of the Commonwealth': *Constitution* s 95.

[4] *Constitution* s 89.

[5] *Constitution* s 93

[6] *Constitution* s 94.

[7] As indicia of 'responsible government': 'what have been described as "three fundamental constitutional principles" supporting parliamentary control of finance: (i) The imposition of taxation must be authorised by parliament. (ii) All Crown revenue forms part of the Consolidated Revenue Fund. (iii) Only parliament can authorise the appropriation of money from the Consolidated Revenue Fund. These principles were imported into the Australian colonies upon their achievement of responsible government: *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 38 (French CJ).

[8] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 36-45 (French CJ). Notably, while concepts of 'responsible government' and parliamentary sanction prior to spending might be desirable, they are most certainly not an absolute requirement: see Enid Campbell, 'Parliamentary Appropriations' (1971) 4 *Adelaide Law Review* 145 at 150. See also John Waugh, 'Evading Parliamentary Control of Government Spending: Some Early Case Studies' (1998) 9 *Public Law Review* 28.

[9] The finance clauses at the Premiers Conference of 1899 'proved the hardest of all to solve, and nearly caused a break-up of the Conference', with the Melbourne Convention clauses being retained, as 'all other proposals are open to more serious objection': see John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) 219. See also Cheryl Saunders, 'The Hardest Nut to Crack: The Financial Settlement in the Commonwealth Constitution' in Greg Craven (ed), *The Convention Debates 1891-98: Commentaries, Indices and Guide* (1986) pp 149-156.

[10] The transitional arrangements finally agreed to provided for the Commonwealth on its establishment to take over the collection and control of State customs duties and excise (*Constitution* s 86), and then for the Commonwealth to impose uniform customs duties within two years of its establishment (*Constitution* s 88). In the period before the Commonwealth imposed uniform customs duties the Commonwealth was required to pay monthly the balance of the States' customs duties less any expenditure (*Constitution* s 89). During the five years after uniform customs duties were imposed, or 'until the Parliament otherwise provides', the Commonwealth was to account to the States (*Constitution* s 93), and thereafter make payments to the States of the surplus 'on such basis as it [the Parliament] deems fair' (*Constitution* s 94).

arrangements structured to comply with the Parliament's and Executive's interpretations of the constitutional obligations, and then addresses the detailed constitutional questions. After this the detailed framework obligations for the predominant expenditure areas of procurement of goods and services, granting and 'financial assistance' to the States (and Territories) are considered.

7.2 Financial framework

The *Audit Act 1901* (Cth) was the original statute that addressed the *Constitution*'s financial obligations. Starting in the early 1990s there have been a range of reforms reflecting the advent of modern governance arrangements favouring devolved responsibility and new methods of accrual budgeting that the Parliament has addressed through a new regulatory, accounting and accountability framework for the Australian Government's expenditures. The first tranche of the Australian Government's financial framework reforms was set out in the original *Financial Management and Accountability Act 1997* (Cth) ('original *FMA Act*'),[11] the *Commonwealth Authorities and Companies Act 1997* (Cth) and the *Auditor-General Act 1997* (Cth),[12] that together replaced the *Audit Act 1901* (Cth).[13] The *Financial Management and Accountability Act 1997* (Cth) the *Commonwealth Authorities and Companies Act 1997* (Cth) addresses different aspects of the Australian Government's regulatory,[14] accounting and accountability framework, and the *Auditor-General Act 1997* (Cth) specifically addresses the accountability framework (and the *Auditor-General Act 1997* (Cth) is considered in detail in the next chapter).

7.2.1 Financial Management and Accountability Act 1997 *(Cth)*

The original *FMA Act* established a 'regulatory/ accounting/ accountability framework for dealing with and managing the money and property of the Commonwealth'.[15] The Act specified the 'responsibilities and powers necessary for the efficient, effective and ethical use of the resources lawfully available to the Commonwealth to carry out its program' and provided 'for appropriate mechanisms to ensure that the stewardship and management performance of those who are responsible for those resources can be made visible and, thereby, allow them to be held accountable'.[16] This was to be achieved by requiring Agency[17] Chief Executives[18] to manage their

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[11] 'Original *FMA Act*' is used here to denote the Act *before* the amendments made by the *Financial Management Legislation Amendment Act 1999* (Cth), the *Financial Framework Legislation Amendment Act 2005* (Cth) and the *Financial Framework Legislation Amendment Act (No 1) 2006* (Cth) amendments.

[12] See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, pp 8342, 8344 and 8346 (John Fahey, Minister for Finance). Notably Bills similar to the *Financial Management and Accountability Bill 1996* (Cth), the *Commonwealth Authorities and Companies Bill 1996* (Cth) and the *Auditor-General Bill 1996* (Cth) had been introduced in 1994, referred to a committee and lapsed when the Parliament was prorogued in 1996: see Joint Committee of Public Accounts, *An Advisory Report on the Financial Management and Accountability Bill 1994, the Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994, and on a Proposal to Establish an Audit Committee of Parliament*, Report 331 (1994). Transition provisions for the *Financial Management and Accountability Bill 1996* (Cth), the *Commonwealth Authorities and Companies Bill 1996* (Cth) and the *Auditor-General Bill 1996* (Cth) were also introduced at the same time in the *Audit (Transitional and Miscellaneous) Amendment Bill 1996* (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, pp 8349 (John Fahey, Minister for Finance).

[13] *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth) sch 1.

[14] There are some governmental entities outside these arrangements: see, for example, the High Court of Australia administered under the *High Court of Australia Act 1979* (Cth).

[15] Explanatory Memorandum, Financial Management and Accountability Bill 1996 (Cth) p 1.

[16] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, pp 8344-8345 (John Fahey, Minister for Finance).

[17] *Financial Management and Accountability Act 1997* (Cth) s 5. These are a Department of State (including persons allocated to that Department) (see *Financial Management and Accountability Regulations 1997* (Cth) rr 4(1)(a)-(d), (f)), a Department of the Parliament (including persons allocated to that Department) (see r 4(1)(e)), and a 'prescribed Agency' (see *Financial Management and Accountability Act 1997* (Cth) s 5: 'a body, organisation or group of persons prescribed by the regulations for the purpose of this definition'; for the purposes of this definition r 5 prescribed the 'body, organisation or group' set out in sch 1, and 'other persons who perform financial tasks in relation to a function of a person referred to in an item in sch 1').

[18] *Financial Management and Accountability Act 1997* (Cth) s 5. For a prescribed Agency, 'the person identified by the regulations as the Chief Executive of the Agency', and for any other Agency, 'the person who is the Secretary of the Agency for the purposes of the *Public Service Act 1999* (Cth) or the *Parliamentary Service Act 1999* (Cth)'; noting that the

resources efficiently, effectively and ethically,[19] and setting out mandatory accounting requirements to satisfy the Finance Minister's role of preparing an account of the Commonwealth for the Parliament.[20] The central objective of this reform was to devolve financial management to Commonwealth Agencies by giving Chief Executives the powers to make, and then be accountable for, decisions about expenditure and the use of the money and other resources of the Commonwealth under their control.[21]

The second tranche of financial framework reform was set out in the *Financial Management Legislation Amendment Act 1999* (Cth),[22] which aligned the legislative framework of the original *FMA Act* with an accrual budgeting arrangement. The amending Act essentially replaced the 'fund accounting' that had been carried over from the *Audit Act 1901* (Cth):[23] it removed the requirement that all cash transactions be debited or credited to a fund account in a central ledger and provided for the transactions of Agencies to be processed and recorded in their own accounting systems. This arrangement still retained an Agency's ability to hypothecate[24] money for particular purposes through Special Accounts.[25] That is, using a Special Account, Agency's could still pledge that an identified amount of money may be expended without actually delivering or transferring that amount.

These Special Accounts served the same purpose as, and are analogous to, Trust Fund 'trust accounts' under the *Audit Act 1901* (Cth). The *Audit Act 1901* (Cth) had maintained a separate CRF, Loan Fund[26] and Trust Fund.[27] Revenue and money from different sources was credited to these

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Public Service Act 1999 (Cth) s 7 provides that the 'Secretary' means 'the Secretary of a Department'; the term 'Department' is defined to mean 'a Department of State, excluding any part that is itself an Executive Agency or Statutory Agency'; the term 'Agency Head' is defined to mean 'the Secretary of a Department', 'the Head of an Executive Agency' or 'the Head of a Statutory Agency' and the *Parliamentary Service Act 1999* (Cth) s 7 provides that the 'Secretary' means 'the Secretary of a Department and includes the Clerk of the Senate and the Clerk of the House of Representatives' and that 'Secretary of a Department' means '(a) if the Department is the Department of the Senate – the Clerk of the Senate; or (b) if the Department is the Department of the House of Representatives – the Clerk of that House; or (c) if the Department is another Department – the Secretary of that Department'.

[19] *Financial Management and Accountability Act 1997* (Cth) s 44. This was assisted through issuing Chief Executive Instructions (s 52), implementing a Fraud Control Plan (s 45) and requiring an Agency Audit Committee (s 46).

[20] *Financial Management and Accountability Act 1997* (Cth) ss 54-57. The standards are proscribed by the Finance Minister's Orders (s 63).

[21] See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8345 (John Fahey, Minister for Finance).

[22] See Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 1999, p 2283 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration). Other amendments were included in the *Public Employment (Consequential and Transitional) Amendment Act 1999* (Cth), *Financial Management and Accountability Amendment Act 2000* (Cth), *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth) and the *Parliamentary Service (Consequential and Transitional) Determination 2000/1* (Cth).

[23] The change being '[t]he requirements for debiting and crediting all cash transactions to a fund account in a central ledger will be removed. In future, transactions of Agencies will be processed and recorded in their own accounting systems. The amendments will therefore facilitate the move to devolve accounting and banking arrangements for Agencies, consistent with more business like approaches used in the private sector': Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) p 1.

[24] In essence, pledging that an identified amount may be expended without actually delivering or transferring that amount; thus, '[a] Special Account is a ledger within the CRF established by Section 81 of the *Constitution* ... (which) allows an identified amount of money to be set aside and spent for specific purposes': Commonwealth, *Committee Hansard*, Senate Finance and Public Administration Legislation Committee, 21 November 2002, 22 (Senator Stephen Conroy) citing an unidentified Department of Finance and Administration publication.

[25] See Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) p 1. Notably Special Accounts are generally operated by *Financial Management and Accountability Act 1997* (Cth) 'Agencies' (*Financial Management and Accountability Act 1997* (Cth) s 5), although they may also be operated by bodies under the *Commonwealth Authorities and Companies Act 1997* (Cth): see Commonwealth, *Guidelines for the Management of Special Accounts*, Financial Management Guidance No 7 (2003) p 3. See also Department of Finance and Administration, *Guidelines for the Management of Special Accounts*, Finance Circular 2003/09 (2003).

[26] Made up of 'components' under 'separate heads': *Audit Act 1901* (Cth) s 55(2).

separate accounts, including the 'components' making up the Trust Fund 'trust accounts'.[28] Each 'component' was accounted for separately under a comprehensive centrally controlled accounting framework.[29] Under the original *FMA Act all* revenue and money received by the Commonwealth as 'public money'[30] was to be credited to the CRF,[31] unless it was 'special public money',[32] or overdraft drawings.[33] Amounts in the CRF could be transferred to the Loan Fund.[34] Amounts from either the CRF or Loan Fund could then be transferred to 'components' of the Reserve Money Fund[35] and the Commercial Activities Fund.[36] The Reserve Money Fund and Commercial Activities Fund were a 'purpose based' replacement for the Trust Fund.[37] The 'components' of the Reserve Money Fund and Commercial Activities Fund were established by a written determination for the purposes specified in the determination[38] or a specified commercial activity[39] respectively,[40] and existing *Audit Act 1901* (Cth) Trust Fund trust accounts were subjected to transition arrangements.[41] Each 'component' of the Reserve Money Fund and Commercial Activities Fund were accounted for by Chief Executives according to directions issued by the Finance Minister.[42]

The *Financial Management Legislation Amendment Act 1999* (Cth) merged the Loan Fund and the 'components' of the Reserve Money Fund and the Commercial Activities Fund into the single CRF.[43] Significantly, 'special public money' and overdraft drawings ceased to be classed separately and merely formed part of the same common CRF.[44] The 'new' Special Accounts preserved the

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[27] Made up of 'components' known as 'trust accounts': *Audit Act 1901* (Cth) ss 60 and 62A; s 62A was an amendment by the *Audit Act 1906* (Cth) s 13 'to legalise certain accounts which have been in existence for some time': Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 1906, p 2066 (John Forrest, Treasurer).

[28] For an illustration of the model showing typical transfers see Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Inquiry into the Draft Financial Framework Legislation Amendment Bill*, Report 395 (2003) app J.

[29] Through cash accounting and the maintenance of a central ledger by the Department of Finance and Administration dealing with each and every payment made by the Commonwealth: for a description of these arrangement in dealing with trust accounts see *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 574 (Mason CJ, Deane, Toohey and Gaudron JJ). For an early account see Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 1901, p 1249 (George Turner, Treasurer).

[30] Being 'money in the custody or under the control of the Commonwealth' or 'money in the custody or control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money', and these both include 'money that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth': see *Financial Management and Accountability Act 1997* (Cth) s 5. It is notable that 'special public money' is a subset of 'public money' (s 5 and s 16).

[31] Original *FMA Act* s 18. For an illustration of the model showing typical transfers see Joint Committee of Public Accounts and Audit, *Inquiry into the Draft Financial Framework Legislation Amendment Bill*, Report 395 (2003) app J.

[32] Being 'public money that is not held on account of the Commonwealth or for the use or benefit of the Commonwealth' according to Special Instructions issued by the Finance Minister: *Financial Management and Accountability Act 1997* (Cth) s 16. The note to this section provides 'Money held on trust for another person is an example of special public money'. Although note that the place of the Commonwealth as a trustee of money may not result in that money being outside, or separate from, the CRF.

[33] Original *FMA Act* s 8. Although this did not include 'advances' made according to s 38.

[34] Original *FMA Act* s 19.

[35] Original *FMA Act* s 20.

[36] Original *FMA Act* s 21

[37] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, pp 8345-8346 (John Fahey, Minister for Finance). Many of the features of the Reserve Money Fund and Commercial Activities Fund reflected the *Audit Act 1901* (Cth) s 60 accounts, although the Reserve Money Fund and Commercial Activities Fund authorise expenditure and so included a standing appropriation up to the amount credited to the account, and therefore also included a special procedure for Parliamentary scrutiny (s 22).

[38] Original *FMA Act* s 20(2). These determinations were subject to special disallowance rules (s 22).

[39] Original *FMA Act* s 21(2). These determinations were subject to special disallowance rules (s 22).

[40] Transition arrangements were set out in the *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth).

[41] See *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth) sch 2. Note Original *FMA Act* s 25.

[42] Original *FMA Act* ss 24, 48 and 63. See also *Financial Management and Accountability Orders 1997* (Cth).

[43] See Joint Committee of Public Accounts and Audit, *Inquiry into the Draft Financial Framework Legislation Amendment Bill*, Report 395 (2003) app J. See also Department of Finance and Administration, *Reserved Money Fund (RMF) and Commercial Activities Fund (CAF) – Transition to 'Special Accounts'*, Finance Circular 1999/03; Commonwealth, *Guidelines for the Management of Special Accounts*, Financial Management Guidance No 7 (2003).

[44] See Original *FMA Act* ss 8 and 17.

rights and obligations of the 'components' of the Reserve Money Fund and Commercial Activities Fund,[45] but hypothecated amounts for specific purposes, supported by an appropriation.[46] In other words, they are 'no longer part of a separate fund (represented by money set aside from the CRF) but are simply ledger accounts recording the right to draw money from the CRF'.[47] The significance of this arrangement was the use of non-lapsing appropriations so that there was no longer a requirement to set aside amounts from the CRF to another place (usually another fund) until payment was actually required. This removed the need for fund accounting through a central ledger[48] and opened the way for accrual budgeting.[49]

The third tranche of financial framework reform was set out in the *Financial Framework Legislation Amendment Act 2005* (Cth) and the *Financial Framework Legislation Amendment Act (No 1) 2006* (Cth).[50] The *Financial Framework Legislation Amendment Act 2005* (Cth) included amendments 'clarifying and expanding the information required, or allowed, in a determination of the Finance Minister that establishes a Special Account'.[51] The *Financial Framework Legislation Amendment Act (No 1) 2006* (Cth) implemented consequential amendments that ensured consistent terminology for Special Accounts.[52] These Acts also implemented consequential amendments that ensured consistent terminology across the statute book that had been foreshadowed in the *Financial Management Legislation Amendment Act 1999* (Cth), transferred the powers from the Treasurer to the Finance

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[45] *Financial Management Legislation Amendment Act 1999* (Cth) s 5. See Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) p 6.

[46] *Financial Management and Accountability Act 1997* (Cth) ss 20(4) and 21(1). The term 'hypothecated' also includes situations where the Commonwealth holds money as a genuine trustee, for States, as part of a business operation, and so on: see Commonwealth, *Committee Hansard*, Joint Committee of Public Accounts and Audit, 7 March 2004, PA8 (Ian McPhee).

[47] Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) p 6. Put another way, 'Special Accounts allow money in the CRF to be set aside for particular spending purposes, and moneys in a Special Account can only be spent for the purposes nominated': Commonwealth, *Committee Hansard*, Joint Committee of Public Accounts and Audit, 7 March 2004, PA8 (Ian McPhee).

[48] See Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) pp 1 and 6. This was a significant change as this also removed the requirement to transfer money between accounts to keep them in positive balance.

[49] Notably, however, there is some practical requirements to deal with the cash amounts that reflect credit amounts in Special Accounts, thus 'the balances that are in special accounts – particularly in our [the Department of Finance and Administration's] current program of not allowing or permitting Agencies to have cash until they have an immediate need for it – are probably invariably not cash. They are, however, an entitlement to an appropriation, and that is the nature of the numbers that are in the special account, or part of the numbers that are in the special account. So, if we went through and added up all the balances in special accounts, at the end of the day we just would not have a cash number. If we, however, add up all the cash on hand balances that are sitting in balances sheets of all the Agencies, then we do have a cash number, and that is the number that we have used [to calculate the balance of the CRF]. For FMA Agencies, along with special public money, that legally is the CRF, which is about all moneys raised and received by the Commonwealth': Commonwealth, *Committee Hansard*, Senate Finance and Public Administration Legislation Committee – Estimates, 17 February 2004, 133 (Jim Kerwin).

[50] See Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 2005, p 17 (Sharman Stone, Parliamentary Secretary to the Minister for Finance and Administration) (*Financial Framework Legislation Amendment Act (No 1) 2006* (Cth)); Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2004, p 4 (Sharman Stone, Parliamentary Secretary to the Minister for Finance and Administration) (*Financial Framework Legislation Amendment Act 2005* (Cth)), noting that this legislation was introduced into the 41st Parliament and lapsed following the calling of the election: see Commonwealth, *Parliamentary Debates*, House of Representatives, 11 August 2004, p 32678 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration).

[51] Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2004, p 5 (Sharman Stone, Parliamentary Secretary to the Minister for Finance and Administration); *Financial Framework Legislation Amendment Act 2005* (Cth) sch 1 (pt 1) 'contains two broad types of proposed amendments: references to components of the Reserve Money Fund are replaced with references to Special Accounts; and references to "paid to Consolidated Revenue Fund" are replaced with references to "paid to the Commonwealth"': Explanatory Memorandum, Financial Framework Legislation Amendment Bill 2004 (Cth) 6; the *Financial Management and Accountability Act 1997* (Cth) Special Account amendments see *Financial Framework Legislation Amendment Act 2005* (Cth) sch 1 (items 139-144).

[52] *Financial Framework Legislation Amendment Act (No 1) 2006* (Cth) sch 1. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 2005, p 17 (Sharman Stone, Parliamentary Secretary to the Minister for Finance and Administration).

Minister to approve investments, money raising and guarantees for certain bodies that are legally and financially separate from the Commonwealth, clarified certain delegation powers of the Finance Minister[53] and repealed certain 'redundant' Acts.[54]

The fourth and ongoing tranche of financial framework reform was set out in the *Financial Framework Legislation Amendment Act (No 1) 2007* (Cth)[55] and the *Financial Framework Legislation Amendment Act 2008* (Cth).[56] The statutes included amendments to reduce the complexity of various operations, including managing various appropriations, non-government entities dealing with 'public money', and so on. These minor reforms were fine tuning as 'part of an ongoing approach to maintaining the financial framework of the Australian government … [an] ongoing process of monitoring and review, and clarifying issues as they arise, is consistent with responsible government'.[57] Other minor reforms reflect other policy developments across government: the imposition of criminal sanctions to protect the Commonwealth government and public officials from criminals causing various financial harms (*Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth));[58] and the GST (*Financial Management and Accountability Amendment Act 2000* (Cth)).[59] The ongoing fine-tuning of the *Financial Management and Accountability Act 1997* (Cth) can be expected. Most recently, the *Financial Framework Legislation Amendment Act 2010* (Cth), among other fine-tuning, added the word 'economical' to the Chief Executive's responsibility in managing the affairs of an Agency to now require the Chief Executive to promote the 'efficient, effective, economical and ethical use [of the Commonwealth resources for which the Chief Executive is responsible] that is not inconsistent with the policies of the Commonwealth'.[60] The term 'economical was included to 'increase the focus on the level of resources the Commonwealth applies to achieve outcomes'.[61]

The result of these legislative developments is a modern financial framework based around accrual budgeting arrangements. The *Financial Management and Accountability Act 1997* (Cth) provides, as a generalisation, the regulatory, accounting and accountability framework:[62]

(a) *Collection, custody and dealings with public money* – 'Public money', being 'money in the custody or under the control of the Commonwealth' or 'money in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money' and 'including such money that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth',[63] must be promptly placed into an

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[53] *Financial Framework Legislation Amendment Act 2005* (Cth) schs 1 (pt 1) and 2. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2004, p 4 (Sharman Stone, Parliamentary Secretary to the Minister for Finance and Administration); Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 1999, p 2285 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration).

[54] *Financial Framework Legislation Amendment Act 2005* (Cth) sch 3; *Financial Framework Legislation Amendment Act (No 1) 2006* (Cth) sch 4.

[55] See Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 2007, p 5 (Gary Nairn, Special Minister of State).

[56] See Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2008, p 6023 (Lindsay Tanner, Minister for Finance and Deregulation).

[57] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2008, p 6023 (Lindsay Tanner, Minister for Finance and Deregulation).

[58] See Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 1999, p 12463 (Daryl Williams, Attorney General).

[59] See Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 2000, p 16131 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration).

[60] *Financial Management and Accountability Act 1997* (Cth) s 44. See also *Financial Framework Legislation Amendment Act 2010* (Cth) s 3 and sch 8 (item 5A).

[61] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2010, p 3876 (Gary Robb, Shadow Finance spokesperson).

[62] Notably, a modified framework applies to certain intelligence agencies and law enforcement agencies: *Financial Management and Accountability Act 1997* (Cth) s 58; *Financial Management and Accountability Regulations 1997* (Cth) sch 2.

[63] *Financial Management and Accountability Act 1997* (Cth) s 5 ('public money').

'official bank account'.[64] Once the money is in such an account it can generally only be withdrawn with authorisation, generally requiring a valid appropriation and a 'drawing right'.[65]

(b) *Appropriations, payments and account keeping* – Records are required to be kept for *all* receipts and expenditures of public money.[66] Where money is to be expended, then the *Commonwealth Procurement Guidelines*,[67] *Commonwealth Grant Guidelines*,[68] and so on,[69] must be complied with *before* money can be withdrawn and expended.[70] This process essentially requires that a spending proposal be approved by an authorised approver[71] after identifying a relevant appropriation,[72] or seeking the Finance Minister's approval for a commitment of future spend,[73] and making a record of the approval.[74] Special provision is made for 'contingent liabilities' and 'loan guarantees' that may commit future un-appropriated money.[75] When payment becomes due,[76] the payment must be made by a person with approval to make the payment (a 'drawing right'),[77] debiting an appropriation, subject to various provisions for repayments.[78] There are various provisions dealing with Agency receipts,[79] acts of grace payments,[80] waiving debts,[81] and so on.

(c) *Borrowing and investment* – Borrowing, including obtaining an advance on overdraft, is of no effect unless it is authorised by an Act,[82] or short term borrowing by the Finance Minister

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64 *Financial Management and Accountability Act 1997* (Cth) s 10; *Financial Management and Accountability Regulations 1997* (Cth) r 17.

65 *Financial Management and Accountability Act 1997* (Cth) s 13; *Financial Management and Accountability Regulations 1997* (Cth) r 19.

66 *Financial Management and Accountability Act 1997* (Cth) ss 19 and 48.

67 *Financial Management and Accountability Act 1997* (Cth) s 64; *Financial Management and Accountability Regulations 1997* (Cth) r 7. See also Department of Finance and Deregulation, *Commonwealth Procurement Guidelines*, Financial Management Guidance No 1 (2008).

68 *Financial Management and Accountability Act 1997* (Cth) s 64; *Financial Management and Accountability Regulations 1997* (Cth) r 7A. See also Department of Finance and Deregulation, *Commonwealth Grant Guidelines*, Financial Management Guidance No 23 (2009).

69 See, for examples, Department of Finance and Deregulation, *Guidelines on Recruitment Advertising*, Financial Management Guidance No 22 (2009); Department of Finance and Administration, *Australian Government Cost Recovery Guidelines*, Financial Management Guidance No 4 (2005); Department of Finance and Administration, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Department and Agency Contracts)*, Financial Management Guidance No 8 (2004); Department of Finance and Administration, *Australian Government Competitive Neutrality Guidelines for Managers*, Financial Management Guidance No 9 (2004); Department of Finance and Administration, *Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort*, Financial Management Guidance No 6 (2003); and so on.

70 *Financial Management and Accountability Act 1997* (Cth) ss 13 and 44; *Financial Management and Accountability Regulations 1997* (Cth) rr 7-12.

71 *Financial Management and Accountability Regulations 1997* (Cth) r 8.

72 *Financial Management and Accountability Regulations 1997* (Cth) r 10.

73 *Financial Management and Accountability Regulations 1997* (Cth) r 10.

74 *Financial Management and Accountability Regulations 1997* (Cth) r 12.

75 *Financial Management and Accountability Regulations 1997* (Cth) rr 10 and 10A.

76 There are policies directed to payment periods and penalties for late payment by Commonwealth agencies: see, for example, Department of Finance and Deregulation, *Procurement 30 Day Payment Policy for Small Business*, Finance Circular No 2008/10 (2008).

77 *Financial Management and Accountability Act 1997* (Cth) ss 26 and 27.

78 *Financial Management and Accountability Act 1997* (Cth) ss 28-30A.

79 *Financial Management and Accountability Act 1997* (Cth) ss 31 and 32A; *Financial Management and Accountability Regulations 1997* (Cth) rr 15 and 16.

80 *Financial Management and Accountability Act 1997* (Cth) s 33; *Financial Management and Accountability Regulations 1997* (Cth) rr 29 and 30.

81 *Financial Management and Accountability Act 1997* (Cth) s 34; *Financial Management and Accountability Regulations 1997* (Cth) rr 29 and 30.

82 *Financial Management and Accountability Act 1997* (Cth) s 37. These are generally the Loans Acts: see, for example, *Loan (Temporary Revenue Deficits) Act 1953* (Cth) ss 4 and 5.

(such as credit cards and credit vouchers).[83] It is *only* the Finance Minister and the Treasurer that invest public money in an authorised investment[84] being primarily securities of the Commonwealth or of a State or Territory, securities guaranteed by the Commonwealth, a State or a Territory and bank deposits.[85]

(d) *Control and management of public property* – Public property, being 'property in the custody or under the control of the Commonwealth', or 'property in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the property', and 'including such property that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth', must not be misapplied, improperly used or disposed,[86] or given away.[87]

(e) *Governance arrangements* – The key responsibility of Chief Executives is to 'manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible' where 'proper use' means 'efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth'.[88] In satisfying this obligation the Chief Executive must also keep the responsible Minister and Finance Minister informed,[89] implement a fraud control plan,[90] establish and maintain an audit committee,[91] recover debts,[92] maintain accounts and records,[93] have the financial statements audited by the Auditor-General,[94] and provide any required financial statements to the Finance Minister.[95]

(f) *Reporting and audit* – The Finance Minister must publish financial statements monthly,[96] prepare the annual financial statements comprising an operating statement, a statement of financial position, a statement of cash flows, and notes to the financial statements,[97] and have those annual statements audited by the Auditor-General.[98]

For the purposes of accounting, the Australian Government is divided into three parts:

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83 *Financial Management and Accountability Act 1997* (Cth) s 38; *Financial Management and Accountability Regulations 1997* (Cth) r 21.

84 *Financial Management and Accountability Act 1997* (Cth) s 39; *Financial Management and Accountability Regulations 1997* (Cth) r 22. See also Department of Finance and Administration, *Investment of Public Money - Section 39 of the Financial Management and Accountability Act 1997*, Finance Circular No 2005/11 (2005). Notably some investments are outside this scheme: see, for examples, *Nation-building Funds Act 2008* (Cth) ss 34(6) and 121(3) (Building Australia Fund), 153(6) and 206(3) (Education Investment Fund), 228(6) and 274(3) (Health and Hospitals Fund); *Future Fund Act 2006* (Cth) s 17(6) (Future Fund).

85 *Financial Management and Accountability Act 1997* (Cth) s 39(10).

86 *Financial Management and Accountability Act 1997* (Cth) s 41.

87 *Financial Management and Accountability Act 1997* (Cth) s 43.

88 *Financial Management and Accountability Act 1997* (Cth) s 44.

89 *Financial Management and Accountability Act 1997* (Cth) s 44A.

90 *Financial Management and Accountability Act 1997* (Cth) s 45.

91 *Financial Management and Accountability Act 1997* (Cth) s 46; *Financial Management and Accountability Regulations 1997* (Cth) r 22C.

92 *Financial Management and Accountability Act 1997* (Cth) s 47.

93 *Financial Management and Accountability Act 1997* (Cth) ss 48 and 63. See also *Financial Management and Accountability Orders 2009* (Cth); amended *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2009* (Cth).

94 *Financial Management and Accountability Act 1997* (Cth) ss 49, 57 and 63. See also *Financial Management and Accountability Orders 2009* (Cth); amended *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2009* (Cth).

95 *Financial Management and Accountability Act 1997* (Cth) s 50.

96 *Financial Management and Accountability Act 1997* (Cth) s 54.

97 *Financial Management and Accountability Act 1997* (Cth) s 55; *Financial Management and Accountability Regulations 1997* (Cth) r 22A.

98 *Financial Management and Accountability Act 1997* (Cth) s 56; *Financial Management and Accountability Regulations 1997* (Cth) r 22B.

(a) *General government sector* (GGS)[99] – These are bodies whose primary function is to provide mainly non-market public services for the collective consumption of the community, or involve the transfer or redistribution of income. These bodies include Departments of State, and most statutory agencies.

(b) *Public financial corporations* (PFCs) – These are bodies that engage in financial intermediation services or auxiliary financial services and that are able to incur financial liabilities on their own account, including taking deposits, issuing securities or providing insurance services. These bodies include the Reserve Bank of Australia.

(c) *Public non-financial corporations* (PNFCs) – These are bodies that provide goods and services that are mainly market, non-regulatory and non-financial in nature, financed mainly through sales to consumers of these goods and services. These bodies include Telstra Corporation Limited and the Australian Postal Corporation.

The accrual accounting is performed using the *Primary Reporting and Information Management Aid* (PRIMA) system. PRIMA provides structured worksheets with the required disclosures for the financial reports of Australian Government bodies incorporating requirements of Australian Accounting Standards and the form of accounts and records prescribed in detail by the *Finance Minister's Orders*.[100] These Orders are provided with policy and guidance materials added by the Department of Finance and Deregulation to assist each Agency maintain and submit their financial statements.[101] The *Finance Minister's Orders* are also 'disallowable instruments' requiring the involvement of Parliament in their implementation.[102] The financial statements are audited by the Auditor-General,[103] and the audited statements are included in the *Public Service Act 1999* (Cth) *Annual Report*.[104] The *Annual Report* is then the 'key reference document'[105] that links the financial management and other people management arrangements within an outcomes and outputs/programs framework set out in the *Portfolio Budget Statements* (and *Portfolio Additional Estimates Statements*) accompanying the Budget appropriations.[106] The intention of these reporting obligations

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[99] See Australian National Audit Office, *Audits of the Financial Statements of Australian Government Entities for the Period Ended 30 June 2006*, Audit Report No 15 2006-07 (2007) p 23. See also Australian Accounting Standards Board, *Whole of Government and General Government Sector Financial Reporting*, AASB 1049 (2007).

[100] *Financial Management and Accountability Act 1997* (Cth) s 63; *Finance Minister's Orders (For Reporting Periods Ending on or After 1 July 2009) 2010* (Cth); Department of Finance and Deregulation, *Finance Minister's Orders for Financial Reporting (Incorporating Policy and Guidance), Requirements and Guidance for the Preparation of Financial Statements of Australian Government Entities for Reporting Periods Ending on or After 1 July 2009* (2010). See also Australian National Audit Office, *Preparation of Financial Statements by Public Sector Entities*, Better Practice Guide (2006).

[101] See, for example, Department of Finance and Deregulation, *Finance Minister's Orders for Financial Reporting (Incorporating Policy and Guidance): Requirements and Guidance for the Preparation of Financial Statements of Australian Government Entities for Reporting Periods Ending on or after 1 July 2009* (2010).

[102] *Financial Management and Accountability Act 1997* (Cth) s 63. See also *Legislative Instruments Act 2003* (Cth) s 42.

[103] *Financial Management and Accountability Act 1997* (Cth) s 57; *Financial Management and Accountability Regulations 1997* (Cth) rr 22A and 22B. See also *Auditor-General Act 1997* (Cth) s 11.

[104] *Financial Management and Accountability Act 1997* (Cth) s 57(7). This has been interpreted to mean the *Annual Report* required by the *Public Service Act 1999* (Cth) ss 44(1) (Public Service Commissioner), 63(1) (Secretary of a Department) and 70 (Head of an Executive Agency): see Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010) pp 14-15; Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Better Practice Guide (2002) p 5.

[105] Australian National Audit Office, *Annual Performance Reporting*, Audit Report No 11 (2003) p 21. See also *Senate Standing Order* 25(21); Australian National Audit Office and Department of Finance and Administration, *Guide on Annual Performance Reporting*, Better Practice Guide (2004).

[106] See Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Better Practice Guide (2002) p 5. See also Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2009) pp 3-4.

is to enhance accountability, responsibility and transparency through a 'clear read' between the Budget documents and the subsequent reporting obligations.[107]

7.2.2 Commonwealth Authorities and Companies Act 1997 *(Cth)*

The *Commonwealth Authorities and Companies Act 1997* (Cth) established a regulatory, accounting and accountability framework for all those Commonwealth bodies that had previously been covered by the *Audit Act 1901* (Cth) pt IX (predominantly statutory authorities) and the plethora of other Commonwealth bodies having their own financial, reporting and auditing provisions:[108]

> The underlying purpose of the proposed *Commonwealth Authorities and Companies Act* is to replace all of these diverse accountability requirements with a single set of core requirements. The approach proposed will enable the accountability requirements of Commonwealth controlled bodies to be viewed as a whole and should significantly streamline the focus of the government's and the parliament's interest in this area.[109]

The underlying objective of this framework is devolved management consistent with the entity's departure from Ministerial control, and its legal and financial separation from the Commonwealth,[110] while being able to assess and compare the financial performance of individual bodies through obligatory and uniform reporting and audit requirements.[111] The *Commonwealth Authorities and Companies Act 1997* (Cth) applies to 'financially autonomous incorporated Commonwealth bodies that can acquire legal ownership in their own right'.[112] In contrast, the *Financial Management and Accountability Act 1997* (Cth)[113] applies to 'agents of the Commonwealth'[114] that 'function only as a financial and custodial agent for the legal entity that is the Commonwealth, without acquiring separate legal ownership of the … assets it deals with on the Commonwealth's behalf'.[115] The *Commonwealth Authorities and Companies Act 1997* (Cth) distinguishes between:

(a) *Commonwealth authorities*,[116] being a 'body that holds money on its own account'[117] that is '(a) a body corporate that is incorporated for a public purpose by an Act; (b) a body corporate that

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[107] See Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010) p 3; Andrew Murray, *Review of Operation Sunlight: Overhauling Budget Transparency* (2008) pp 90-91; Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (2007) pp 77-83; Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Better Practice Guide (2002) pp 5-6; and so on.

[108] See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, pp 8346-8347 (John Fahey, Minister for Finance).

[109] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8347 (John Fahey, Minister for Finance).

[110] Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No 2 (2005) 56-57. See also Australian National Audit Office, *CAC Boards*, Guidance Paper No 3 (2003); Australian National Audit Office, *Corporate Governance in Commonwealth Authorities and Companies*, Discussion Paper (1999).

[111] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8349 (John Fahey, Minister for Finance). See also Department of Finance and Administration, *Requirements and Guidance for the Preparation of Financial Statements of Australian Government Entities (Incorporating Explanatory Notes as Guidance): For Reporting Periods Ending On or After 30 June 2005, Unless Amended* (2005) pp 5-6. See, generally, Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) pp 89-116; Australian National Audit Office, *CAC Boards*, Guidance Paper No 3 (2003) pp 1-3; Australian National Audit Office, *Monitoring Board Performance*, Guidance Paper No 5 (2003) pp 1-2.

[112] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8344 (John Fahey, Minister for Finance).

[113] See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8344 (John Fahey, Minister for Finance).

[114] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8344 (John Fahey, Minister for Finance).

[115] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8344 (John Fahey, Minister for Finance). There are also other governmental entities outside the realms of the *Financial Management and Accountability Act 1997* (Cth) and *Commonwealth Authorities and Companies Act 1997* (Cth) such as the High Court of Australia administered under the *High Court of Australia Act 1979* (Cth).

[116] *Commonwealth Authorities and Companies Act 1997* (Cth) ss 5 and 7(1) and pt 3.

is incorporated for a public purpose by: (i) regulations under an Act; or (ii) an Ordinance of an external Territory (other than Norfolk Island) or regulations under such an Ordinance; and is prescribed for the purposes of this paragraph by regulations under this Act',[118] but not '(a) Corporations Act companies; (b) corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* [(Cth)]; (c) associations that are organisations (within the meaning of the *Fair Work (Registered Organisations) Act 2009* [(Cth)])'.[119] Of the Commonwealth authorities, a further distinction is made between Government Business Enterprises (GBEs),[120] Statutory Marketing Authorities (SMAs)[121] and all other Commonwealth authorities. Essentially the GBEs and SMAs are able to invest their 'surplus money'[122] with less oversight by the Finance Minister,[123] although there are some specific additional governance arrangements.[124]

(b) *Commonwealth companies*,[125] being 'a *Corporations Act* [*2001* (Cth)] company that the Commonwealth controls'[126] but 'it does not include a company that is a subsidiary of a Commonwealth authority or Commonwealth company'.[127] The 'control' relates to the composition of the company's board, the voting or the shares.[128] Notably some of those bodies classified as GBEs are also Commonwealth companies.[129]

The essence of the distinction between Commonwealth authorities and Commonwealth companies is in the sources of their management framework obligations.[130] Commonwealth authorities must comply with the *Commonwealth Authorities and Companies Act 1997* (Cth) obligations as well as those obligations imposed by their enabling legislation[131] and, in some circumstances, their founding constitutions and other administrative arrangements.[132] In contrast, Commonwealth companies must

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117 Unless 'the money is public money as defined in s 5 of the *Financial Management and Accountability Act 1997* (Cth)': *Commonwealth Authorities and Companies Act 1997* (Cth) s 7(3). Where '*public money*' means '(a) money in the custody or under the control of the Commonwealth; or (b) money in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money; including such money that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth', and '*special public money*' means 'public money that is not held on account of the Commonwealth or for the use or benefit of the Commonwealth': *Financial Management and Accountability Act 1997* (Cth) ss 5 and 16.

118 *Commonwealth Authorities and Companies Act 1997* (Cth) s 7(1). The only prescribed body is the 'Army and Air Force Canteen Service Board of Management': *Commonwealth Authorities and Companies Regulations 1997* (Cth) r 6.

119 *Commonwealth Authorities and Companies Act 1997* (Cth) s 7(2).

120 Means 'a Commonwealth authority … that is prescribed by the regulations for the purpose of this definition': *Commonwealth Authorities and Companies Act 1997* (Cth) s 5. See also *Commonwealth Authorities and Companies Regulations 1997* (Cth) r 4.

121 Means 'a Commonwealth authority that is prescribed by the regulations for the purpose of this definition': *Commonwealth Authorities and Companies Act 1997* (Cth) s 5. See also *Commonwealth Authorities and Companies Regulations 1997* (Cth) r 5.

122 Meaning 'money of the authority that is not immediately required for the purposes of the authority': *Commonwealth Authorities and Companies Act 1997* (Cth) ss 18(5) and 19(5).

123 See *Commonwealth Authorities and Companies Act 1997* (Cth) ss 18(3)(d) and 19(3)(d).

124 See Department of Finance and Administration, *Governance Arrangements for Commonwealth Government Business Enterprises* (1997).

125 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 5 and 34(1) and pt 4.

126 *Commonwealth Authorities and Companies Act 1997* (Cth) s 34(1).

127 *Commonwealth Authorities and Companies Act 1997* (Cth) s 34(1).

128 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 34(1A)-(2).

129 Means a 'Commonwealth company that is prescribed by the regulations for the purpose of this definition': *Commonwealth Authorities and Companies Act 1997* (Cth) s 5; *Commonwealth Authorities and Companies Regulations 1997* (Cth) r 4(2).

130 See, generally, Joint Committee of Public Accounts, *The Auditor-General: Ally of the People and the Parliament*, Report No 296 (1989).

131 See *Commonwealth Authorities and Companies Act 1997* (Cth) s 7.

132 This may include other means of governmental transparency and accountability through, for examples, the *Auditor-General Act 1997* (Cth), *Ombudsman Act 1976* (Cth), *Privacy Act 1988* (Cth), *Archives Act 1983* (Cth) and *Public Accounts and Audit Committee Act 1951* (Cth).

comply with the *Corporations Act 2001* (Cth) and their constitutions, and some additional *Commonwealth Authorities and Companies Act 1997* (Cth) obligations.[133] The overall effect of the *Commonwealth Authorities and Companies Act 1997* (Cth) was, however, to:

- replace the diverse accountability requirements of the CAC bodies with a single set of core requirements;
- enable the accountability requirements to be viewed as a whole thereby significantly streamlining the focus of the Government's and the Parliament's interest;
- model the provisions on comparable areas of *Corporations Law* and adopt best practice currently applying to individual authorities; and
- bring the requirements for the Auditor-General's audits of financial statements into line with those required by the *Corporations Law*.[134]

The *Commonwealth Authorities and Companies Act 1997* (Cth) management framework sets out high level general management duties,[135] audit and financial reporting requirements,[136] and compliance with certain general policies of the government.[137] The management unit of a *Commonwealth Authorities and Companies Act 1997* (Cth) Commonwealth authority is generally a governing board of one or more 'directors',[138] subject to director's duties and acting in the interests of the body.[139] The *Commonwealth Authorities and Companies Act 1997* (Cth) model proscribes the reporting obligations for 'directors' and the conduct obligations for 'officers'.[140] The term 'officers' includes 'directors', but also extends to 'a senior manager of the authority'.[141] The intention of this broad term was to align the *Commonwealth Authorities and Companies Act 1997* (Cth) with the *Corporations Act 2001* (Cth) relating to conduct,[142] and potentially captures the activities of some *Commonwealth Authorities and Companies Act 1997* (Cth) body advisers.[143] The *Commonwealth Authorities and Companies Act 1997* (Cth) conduct obligations imposes, in some circumstances, a civil[144] obligation of care and diligence (that

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133 For an overview of these governance arrangements, see Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No 2 (2005) pp 22-27.

134 Joint Committee of Public Accounts and Audit, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997*, Report No 338 (2000) p 6. See also Joint Committee of Public Accounts and Audit, *Corporate Governance and Accountability Arrangements for Commonwealth Business Enterprises*, Report No 372 (2000) pp 14-15.

135 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 21-27P (Commonwealth authorities).

136 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 8-20 (Commonwealth authorities) and 35-44 and 48 (Commonwealth companies).

137 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 28 (Commonwealth authorities) and 43 and 48A (Commonwealth companies). See, for example, Department of the Treasury and Department of Finance and Administration, *Australian Government Competitive Neutrality Guidelines for Managers*, Financial Management Guidance No 9 (2004); Department of Finance and Administration, *Australian Government Competitive Neutrality Guidelines for Managers*, Finance Circular No 2004/01 (2004).

138 Meaning '(a) for a Commonwealth authority that has a council or other governing body – a member of the governing body; or (b) for a Commonwealth authority that does not have a council or other governing body – a member of the authority': *Commonwealth Authorities and Companies Act 1997* (Cth) s 5.

139 These arrangements are generally set out in the legislation establishing the Commonwealth authority. For example, the Australian Law Reform Commission is established by the *Australian Law Reform Commission Act 1996* (Cth) s 5(1) and 'consists' of 'a President, a Deputy President, and at least 4 other members' (s 6(1)) with a rage of powers and functions (ss 20-26), and a 'Board of Management' consisting of 'the President, the Deputy President, and the other full-time members of the Commission' (s 29) whose function is 'to manage the Commission and, in particular, ensure that it performs its functions effectively and economically' (s 28(1)). See also Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No 2 (2005) pp 22-23.

140 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 9-17 (directors' reporting obligations) and 21-27E and 27M-27P (officers' conduct obligations). Notably there are some additional disclosure and voting obligations for directors: ss 27F-27J.

141 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 5 and 21(2).

142 See Explanatory Memorandum, Commonwealth Authorities and Companies Bill 1996 (Cth) p 4. See also *Corporations Act 2001* (Cth) s 9 ('officer').

143 See Joint Committee of Public Accounts and Audit, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997*, Report No 374 (2000) pp 16-17.

144 See *Commonwealth Authorities and Companies Act 1997* (Cth) sch 2. This essentially requires an application to a court for a 'declaration of contravention' (specifying '(a) the Court that made the declaration; (b) the civil penalty provision that was contravened; (c) the person who contravened the provision; (d) the conduct that constituted the contravention;

includes the 'business judgment rule'),[145] a civil and criminal[146] obligation of good faith,[147] proper use of a position[148] or proper use of information,[149] certain duties of disclosure for directors,[150] some restrictions on attendance and voting for directors,[151] and certain indemnities.[152] There is also the requirement to convene an audit committee that functions to help the Commonwealth authority and its directors comply with its *Commonwealth Authorities and Companies Act 1997* (Cth) obligations and 'providing a forum for communication between the directors, the senior managers of the authority and the internal and external auditors of the authority'.[153]

The *Commonwealth Authorities and Companies Act 1997* (Cth) Commonwealth authority regulatory, accounting and accountability framework, as a generalisation, provides:[154]

(a) *Collection, custody and dealings with money* – All money held by a Commonwealth authority is taken to be held by it on its own account 'unless the money is public money as defined in section 5 of the *Financial Management and Accountability Act 1997* [(Cth)]'. The money held by the Commonwealth authority on its own account is held by the legal entity that is the Commonwealth authority (usually a statutory authority established by its founding legislation). Commonwealth authorities must maintain a bank account with a bank and deposit their moneys into that account.[155] 'Public money' according to the requirements of the *Financial Management and Accountability Act 1997* (Cth),[156] and this is money held on account of the Commonwealth rather than the Commonwealth authority.[157]

(e) the Commonwealth authority … to which the conduct related' (sch 2 (cl 1(2)))) and then orders for a pecuniary penalty (up to $200,000: sch 2 (cl 3(1))) and compensation (sch 2 (cl 4)).

145 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 22(1) and (2). Where 'business judgment' means 'any decision to take or not take action in respect of a matter relevant to the operations of the Commonwealth authority' (s 22(3)).

146 This essentially requires 'physical elements' (*Criminal Code Act 1995* (Cth) sch (cl 4.1); '[a] physical element of an offence may be: (a) conduct; or (b) a result of conduct; or (c) a circumstance in which conduct, or a result of conduct, occurs' (sch (cl 4.1(1))) and 'fault elements' (sch (cl 5.1)); '[a] fault element for a particular physical element may be intention, knowledge, recklessness or negligence' (sch (cl 5.1(1))). An offence, consisting of physical elements and fault elements (sch (cl 3.1(1))), is established by proving (the sch requires that the prosecution prove the existence of the matter (cl 13.1(1)) beyond reasonable doubt (sch (cl 13.2(1))) 'the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt' (sch (cl 3.2(a))), and 'in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element' (sch (cl 3.2(b))).

147 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 23(1) and 26(1). There is a s 23 defence if the officer is required to do the act under the *Commonwealth Authorities and Companies Act 1997* (Cth) (s 27A(1)) or in the course of the performance of duties as a public servant appointed or engaged under the *Public Service Act 1999* (Cth) (s 27A(2)) and for a director in some circumstances acting in good faith and after making proper inquiry if appropriate (ss 27D and 27E).

148 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 24(1) and 26(2). There is a s 24 defence if the officer is required to do the act under the *Commonwealth Authorities and Companies Act 1997* (Cth) (s 27A(1)), or in the course of the performance of duties as a public servant appointed or engaged under the *Public Service Act 1999* (Cth) (s 27A(2)) and for a director in some circumstances acting in good faith and after making proper inquiry if appropriate (ss 27D and 27E).

149 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 25(1) and 26(3). There is a s 25 defence if the officer is required to do the act under the *Commonwealth Authorities and Companies Act 1997* (Cth) (s 27A(1)) or in the course of the performance of duties as a public servant appointed or engaged under the *Public Service Act 1999* (Cth) (s 27A(2)) and for a director in some circumstances acting in good faith and after making proper inquiry if appropriate (ss 27D and 27E).

150 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 27F and 27G.

151 *Commonwealth Authorities and Companies Act 1997* (Cth) s 27J.

152 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 27M-27P.

153 *Commonwealth Authorities and Companies Act 1997* (Cth) s 32.

154 There are also provisions addressing entities controlled by Commonwealth authorities (subsidiaries) (see, for examples, *Commonwealth Authorities and Companies Act 1997* (Cth) s 12, 29, 30 and 31), and some special rules for Commonwealth authorities established by regulations (see *Commonwealth Authorities and Companies Act 1997* (Cth) s 33).

155 *Commonwealth Authorities and Companies Act 1997* (Cth) s 18(2).

156 *Financial Management and Accountability Act 1997* (Cth) s 5.

157 *Commonwealth Authorities and Companies Act 1997* (Cth) s 7.

(b) *Applying Australian Government policies* – A Commonwealth authority must comply with *General Policy Orders* to the extent they apply to the authority.[158] These Orders apply Australian Government policies to the particular authority,[159] although for some authorities the procurement of property or services must comply with the *Commonwealth Procurement Guidelines*.[160]

(c) *Borrowing and investment* – Commonwealth authorities may invest their surplus money (excluding *Financial Management and Accountability Act 1997* (Cth) 'public money') in a limited range of investments.[161] Commonwealth authorities may generally borrow according to their founding legislation, although there may be some limits for credit cards and vouchers.[162]

(d) *Reporting and audit* – An *Annual Report*[163] that includes financial statements[164] that have been audited by the Auditor-General.[165] The financial statements must conform to the *Finance Minister's Orders*.[166] The *Annual Report* is then tabled in Parliament.[167] The content of the *Annual Report* includes a report of operations conforming with the requirements of the *Finance Minister's Orders*,[168] financial statements conforming with the requirements of the *Finance Minister's Orders*,[169] and the Auditor-General's certification of the financial statements.[170] In addition, there are other reporting obligations, including interim reporting to the responsible Minister,[171] budget estimates,[172] various significant events,[173] keeping responsible Ministers and the Finance Minister informed,[174] and for GBEs, preparing a corporate plan.[175]

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158 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 28(1) and 48A. See also Department of Finance and Deregulation, *Application of General Policies of the Australian Government to Bodies Subject to the CAC Act: General Policy Orders*, Finance Circular No 2009/08 (2009). Notably '*General Policy Orders*' are 'legislative instruments' for the purposes of the *Legislative Instruments Act 2003* (Cth) although not subject to disallowance or sun-setting (s 48A(5)).

159 See Department of Finance and Deregulation, *Application of General Policies of the Australian Government to Bodies Subject to the CAC Act: General Policy Orders*, Finance Circular No 2009/08 (2009) pp 2-4; Explanatory Memorandum to the Commonwealth Authorities and Companies Amendment Bill 2008 (2008) pp 5-7.

160 *Commonwealth Authorities and Companies Act 1997* (Cth) s 47A; *Commonwealth Authorities and Companies Regulations 1997* (Cth) r 9 and sch 1(pt 1). See also Department of Finance and Deregulation, *Commonwealth Procurement Guidelines*, Financial Management Guidance No 1 (2008) p 2; *Finance Minister's (CAC Act Procurement) Directions 2004* (Cth).

161 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 18(3) (Commonwealth authorities other than GBEs and SMAs) and 19(3) (GBEs or SMAs).

162 See *Commonwealth Authorities and Companies Act 1997* (Cth) s 28A; *Commonwealth Authorities and Companies Regulations 1997* (Cth) rr 6AA-6AE.

163 *Commonwealth Authorities and Companies Act 1997* (Cth) s 9(1) and sch 1 (item 1).

164 *Commonwealth Authorities and Companies Act 1997* (Cth) s 9(1)(a) and sch 1 (item 2).

165 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 8 as 12(4) (excluded subsidiaries). See also *Auditor-General Act 1997* (Cth) s 12.

166 *Commonwealth Authorities and Companies Act 1997* (Cth) sch 1 (item 2). See also *Commonwealth Authorities and Companies (Report of Operations) Orders 2008* (Cth); amended *Commonwealth Authorities and Companies Orders (Financial Statements for reporting periods ending on or after 1 July 2009) 2009* (Cth). The *Finance Minister's Orders* are also 'disallowable instruments' requiring the involvement of Parliament in their implementation: *Commonwealth Authorities and Companies Act 1997* (Cth) s 48; *Legislative Instruments Act 2003* (Cth) s 42.

167 *Commonwealth Authorities and Companies Act 1997* (Cth) s 9(1)(b). See also *Acts Interpretation Act 1901* (Cth) s 34C.

168 *Commonwealth Authorities and Companies Act 1997* (Cth) s 9(1)(a) and sch 1 (item 1(a)). See also *Commonwealth Authorities and Companies (Report of Operations) Orders 2008* (Cth).

169 *Commonwealth Authorities and Companies Act 1997* (Cth) s 9(1)(a) and sch 1 (item 1(b)). See also amended *Commonwealth Authorities and Companies Orders (Financial Statements for reporting periods ending on or after 1 July 2009) 2009* (Cth).

170 *Commonwealth Authorities and Companies Act 1997* (Cth) s 9(1)(a) and sch 1 (items 1(c) and 3-7). See also *Auditor-General Act 1997* (Cth) s 12.

171 *Commonwealth Authorities and Companies Act 1997* (Cth) ss 13 and 48.

172 *Commonwealth Authorities and Companies Act 1997* (Cth) s 14.

173 *Commonwealth Authorities and Companies Act 1997* (Cth) s 15.

174 *Commonwealth Authorities and Companies Act 1997* (Cth) s 16.

175 *Commonwealth Authorities and Companies Act 1997* (Cth) s 17.

The *Commonwealth Authorities and Companies Act 1997* (Cth) Commonwealth companies, consistent with the entity's departure from Ministerial control (board composition, voting or shares),[176] have less formal regulatory, accounting and accountability framework. The *Corporations Act 2001* (Cth) provides the basic framework[177] and then there are various additional obligations for audit,[178] reporting,[179] audit committees,[180] and compliance with *General Policy Orders*,[181] according to the Commonwealth's control (GBEs, wholly-owned, subsidiary, and so on).

7.3 Accrual budgeting framework

The accrual budgeting framework in place after the *Financial Management Legislation Amendment Act 1999* (Cth) changes essentially ties the budgeting arrangements into the accrual accounting standards for expenditure[182] and then an assessment of performance according to an *Annual Report*.[183] Under the *Financial Management and Accountability Act 1997* (Cth) the obligations on incurring expenditure are thus tied to the recording and reporting standards established by the *Finance Minister's Orders* and *Annual Report* that provide the links between an appropriation and expenditure according to accrual standards. Similarly, the *Commonwealth Authorities and Companies Act 1997* (Cth) requires expenditure to be recorded and reported according to the *Finance Minister's Orders* and *Annual Report* according to accrual standards. This apparently simple prescription glosses over some weighty constitutional questions (and hurdles) in the *Constitution* ss 81 and 83 about the CRF, surplus revenue and appropriations. These are considered next.

7.4 The Consolidated Revenue Fund

Section 81 of the *Constitution* articulates the concepts of '[a]ll revenues or moneys' and 'raised or received' in respect of the 'one [CRF]'. The terms 'revenues and moneys' are critical to the evolution of the modern conception of the CRF. The words in the original draft of the *Constitution* were 'duties, revenues and moneys'.[184] At the Adelaide Convention the words 'duties' and 'moneys' were removed to make it clear that loan moneys did not go to the CRF.[185] This was confirmed at the Melbourne Convention 'for the same reasons'.[186] However, the word 'moneys' was again included in the *Constitution* and the reasons for this inclusion remain unclear.[187] As a consequence, loan moneys were considered to be separate from the CRF[188] so that the *Audit Act 1901* (Cth) operated a

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176 *Commonwealth Authorities and Companies Act 1997* (Cth) s 34(1A).

177 For examples these requirements include *Corporations Act 2001* (Cth) ss 301 (audit of annual financial report), 302 (half-year financial report and directors' report), and so on.

178 See *Commonwealth Authorities and Companies Act 1997* (Cth) s 35.

179 See *Commonwealth Authorities and Companies Act 1997* (Cth) ss 36 (annual report including financial statements), 37 (subsidiary financial statements), 38 (interim reports), 39 (estimates), 40 (significant events), 41 (keeping Ministers informed) and 42 (corporate plans).

180 See *Commonwealth Authorities and Companies Act 1997* (Cth) s 44.

181 See *Commonwealth Authorities and Companies Act 1997* (Cth) s 43.

182 See 'Agency': *Financial Management and Accountability Act 1997* (Cth) ss 48(1) and 63; amended *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2009* (Cth) o 3, sch 1; 'Commonwealth authority': *Commonwealth Authorities and Companies Act 1997* (Cth) ss 8 and 9(1)(a) and sch 1(item 3); amended *Commonwealth Authorities and Companies Orders (Financial Statements for reporting periods ending on or after 1 July 2009) 2009* (Cth) o 3, sch 1; 'subsidiary of a Commonwealth company' and 'wholly-owned Commonwealth company': *Commonwealth Authorities and Companies Act 1997* (Cth) ss 35, 36(1)(c) and 48; amended *Commonwealth Authorities and Companies Orders (Financial Statements for reporting periods ending on or after 1 July 2009) 2009* (Cth) o 3, sch 1.

183 'Agency': *Public Service Act 1999* (Cth) ss 63 and 70; Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010); 'Commonwealth authority': *Commonwealth Authorities and Companies Act 1997* (Cth) s 9(1) and 48 and sch 1(pt 1); *Commonwealth Authorities and Companies (Report of Operations) Orders 2008* (Cth) 0 6, sch 1.

184 See John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 811.

185 See John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 811.

186 See John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 811.

187 See John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 811.

188 Although a contrary view has been expressed by Sir Owen Dixon before the *Royal Commission on the Australian Constitution 1928-1929* where he contemplated that the CRF was a continuous fund that might be appropriated

'Consolidated Revenue Fund'[189] with a separately accounted Loan Fund[190] and a Trust Fund.[191] The revenues and moneys from different sources were credited under these *Audit Act 1901* (Cth) arrangements to the separate 'Consolidated Revenue Fund', Loan Fund and Trust Fund accounts,[192] with each 'component' of the Loan Fund and Trust Fund accounted for separately under comprehensive and centrally controlled ledger arrangements.[193]

New South Wales v Commonwealth (1908) 7 CLR 179

These developments in Parliament were paralleled by the High Court's uncertainty about the form of the CRF and establishing when revenues and moneys entered and moneys left the CRF. The High Court first contemplated the CRF in *New South Wales v Commonwealth* (the *Surplus Revenue case*) (see also ¶7.5, p 211). There the *Old-age Pensions Appropriation Act 1908* (Cth) and the *Coast Defence Appropriation Act 1908* (Cth) appropriated amounts to two *Audit Act 1901* (Cth) trust accounts 'for Invalid and Old-age Pensions' and 'for Harbour and Coastal (Naval) Defence' respectively.[194] The *Audit Act 1901* (Cth) also provided an appropriation that 'moneys standing to the credit of a Trust Account may be expended for the purposes of that account'.[195] The amounts were credited to these trust accounts but were not disbursed during the financial year of the appropriation.[196] Meanwhile the *Surplus Revenue Act 1908* (Cth) provided that for 'all payments to Trust Accounts, established under the *Audit Act 1901-1906*, of money appropriated by law for any purpose of the Commonwealth shall be deemed to be expenditure',[197] and further, that these appropriations did not lapse.[198] The issue before the High Court was whether these appropriated but unexpended amounts were a part of the surplus revenue of the Commonwealth and so payable to the States.[199] In deciding that amounts appropriated according to a valid appropriation law and unexpended were outside the calculations of the surplus revenue,[200] the majority considered that, in the words of Griffith CJ, an 'Appropriation Act … operates as a provisional setting apart or diversion from the [CRF] of the

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irrespective of the money going into the CRF (including loan moneys): see Enid Campbell, 'Parliamentary Appropriations' (1971) 4 *Adelaide Law Review* 145 at 149.

189 At the time of its repeal (by the *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth) sch 1) the *Audit Act 1901* (Cth) s 2 defined 'public moneys' to mean 'revenue, loan, trust and other moneys received or held by any person for or on behalf of the Commonwealth or a prescribed authority, and includes all moneys forming part of the Consolidated Revenue Funds, the Loan Fund or the Trust Fund'.

190 *Audit Act 1901* (Cth) s 55. This was also reflected in the *Financial Management and Accountability Act 1997 (Cth)* until the *Financial Management Legislation Amendment Act 1999* (Cth), with a separate Loan Fund.

191 *Audit Act 1901* (Cth) s 60. This was also reflected in the *Financial Management and Accountability Act 1997 (Cth)* until the *Financial Management Legislation Amendment Act 1999* (Cth), with a separate Reserved Money Fund and Commercial Activities Fund.

192 For an illustration of the model showing typical transfers see Joint Committee of Public Accounts and Audit, *Inquiry into the Draft Financial Framework Legislation Amendment Bill*, Report 395 (2003) app J.

193 Through cash accounting and the maintenance of a central ledger by the Department of Finance and Administration dealing with each and every payment made by the Commonwealth: for a description of these arrangement in dealing with trust accounts see *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 574 (Mason CJ, Deane, Toohey and Gaudron JJ) (*Cemetery Reserve case*). For an early account see Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 1901, p 1249 (George Turner, Treasurer).

194 *New South Wales v Commonwealth* (1908) 7 CLR 179 at 186 (Griffith CJ), 191-192 (Barton J), 200-201 (Isaacs J), 203 (Higgins J).

195 *Audit Act 1901* (Cth) s 62A(6). This was an amendment expressly directed to appropriating amounts received in Commonwealth 'trading': see *Audit Act 1906* (Cth) s 13; Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 1906, p 2066 (John Forrest, Treasurer).

196 *New South Wales v Commonwealth* (1908) 7 CLR 179 at 186 (Griffith CJ), 191-192 (Barton J), 199 (O'Connor J), 201-202 (Isaacs J), 203 (Higgins J).

197 *Surplus Revenue Act 1908* (Cth) s 4(4)(d).

198 *Surplus Revenue Act 1908* (Cth) s 5. Notably, the *Audit Act 1901* (Cth) s 36 provided, subject to some limitations, for all appropriations to lapse at the end of a financial year.

199 *Constitution* s 94. See also *New South Wales v Commonwealth* (1908) 7 CLR 179 at 186-187 (Griffith CJ), 191-192 (Barton J), 197 (O'Connor J), 199 (Isaacs J), 203 (Higgins J).

200 See *New South Wales v Commonwealth* (1908) 7 CLR 179 at 191 (Griffith CJ), 196-197 (Barton J), 199 (O'Connor J), 203 (Isaacs J), 206 (Higgins J).

sum appropriated by the Act'.[201] However, there were different conceptions of exactly how these transactions should be characterised. Griffith CJ and Higgins J considered that the *Old-age Pensions Appropriation Act 1908* (Cth) and the *Coast Defence Appropriation Act 1908* (Cth) validly appropriated amounts (or authorised expenditure of amounts) from the CRF,[202] while Barton, O'Connor and Isaacs JJ considered that the Acts appropriated the CRF and that amounts were drawn from the Treasury and paid to the trust accounts.[203]

Northern Suburbs General Cemetery Reserve Trust v Commonwealth (1993) 176 CLR 555

Later in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (*Cemetery Reserve case*) (see also ¶7.5, p 212) the High Court again considered appropriations involving an *Audit Act 1901* (Cth) trust account.[204] There the *Training Guarantee Act 1990* (Cth) imposed a charge (a tax) on employers of an amount equal to the employer's shortfall of a minimum set training expenditure, and incorporated the *Training Guarantee (Administration) Act 1990* (Cth).[205] The *Training Guarantee (Administration) Act 1990* (Cth) purpose was 'to increase, and improve the quality of, the employment related skills of the Australian workforce so that it works more productively, flexibly and safely, thereby increasing the efficiency and international competitiveness of Australian industry'.[206] The *Training Guarantee (Administration) Act 1990* (Cth) established the Training Guarantee Fund as an *Audit Act 1901* (Cth) trust account.[207] Some of the amounts paid to the Commonwealth by employers were then to be paid into this fund, and then paid to the Commonwealth, to the States under separate agreements, and in reimbursing overpayments or errors in payments.[208] The issues before the High Court included whether the *Training Guarantee (Administration) Act 1990* (Cth) required payments directly to the trust account bypassing the constitutional requirement of payment into CRF and then an appropriation from the CRF.[209] Specifically the *Training Guarantee (Administration) Act 1990* (Cth) required 'amounts paid to the Commonwealth under this Act' and 'amounts paid to the Commonwealth for the purposes of the Fund' to be paid into the Training Guarantee Fund trust account,[210] and provided that 'money in the [Training Guarantee] Fund may be applied for the purposes of … reimbursing the Commonwealth …making payments under training guarantee agreements … refunding any overpaid amounts … or any amounts paid … in error'.[211] The *Audit Act 1901* (Cth) also provided for trust accounts, such as the Training Guarantee Fund, that '[m]oneys standing to the credit of a Trust Account may be expended for the purposes of the account'.[212] In addressing these issues the High Court provided some insights into its conception of the CRF.

The High Court accepted that *all* the moneys received by the Commonwealth formed part of the CRF and required an appropriation to be disbursed.[213] Further, all the judges considered that there was a valid appropriation from the CRF and that the arrangements set out in the *Training Guarantee*

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[201] *New South Wales v Commonwealth* (1908) 7 CLR 179 at 190-191 (Griffith CJ). See also 194 (Higgins J), 199 (O'Connor J), 200 (Isaacs J), 206 (Higgins J).
[202] *New South Wales v Commonwealth* (1908) 7 CLR 179 at 191 (Griffith CJ), 203 (Higgins J).
[203] *New South Wales v Commonwealth* (1908) 7 CLR 179 at 196 ('withdrawn from the Treasury and paid to') (Barton J), 199 ('paid out') (O'Connor J), 201 ('pay it out') (Isaacs J).
[204] Other cases also dealt with *Audit Act 1901* (Cth) trust accounts, although they do not provide significant insights into the CRF: see, for example, *Luton v Lessels* (2002) 210 CLR 333 at 349-350 (Gaudron and Hayne JJ).
[205] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 564-566 (Mason CJ, Deane, Toohey and Gaudron JJ), 585-586 (Dawson J).
[206] *Training Guarantee (Administration) Act 1990* (Cth) s 3(1).
[207] *Training Guarantee (Administration) Act 1990* (Cth) s 32.
[208] *Training Guarantee (Administration) Act 1990* (Cth) ss 33, 34.
[209] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 572 (Mason CJ, Deane, Toohey and Gaudron JJ), 581-582 (Brennan J), 590-591 (Dawson J), 600 (McHugh J).
[210] *Training Guarantee (Administration) Act 1990* (Cth) s 33(a) and (b).
[211] *Training Guarantee (Administration) Act 1990* (Cth) s 34(1).
[212] *Audit Act 1901* (Cth) s 62A(6).
[213] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 572-573 (Mason CJ, Deane, Toohey and Gaudron JJ), 580-581 (Brennan J), 591 (Dawson J), 599 (McHugh J).

Act 1990 (Cth) and the *Training Guarantee (Administration) Act 1990* (Cth) validly complied with the *Constitution*.[214] They differed, however, in their conceptions of the mechanics of payments to the CRF and payments out through appropriations or actual expenditure. The detail of the *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* decisions are significant because they reveal the potential breadth of the CRF conception and the broad potential for the Australian Government and Parliament to craft appropriation and expenditure arrangements that can comply with the *Constitution*.

The joint judgment in the *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* accepted that the moneys forming the CRF could not be separately identified, and that the accounting scheme adopted under the *Audit Act 1901* (Cth) did not necessarily coincide with the CRF: '[t]here are no fiscally separate moneys which can be identified as constituting each of the three accounts, the Consolidated Revenue Fund, the Loan Fund and the Trust Fund'.[215] The arrangements under the *Training Guarantee (Administration) Act 1990* (Cth) were then characterised as payments from employers to the CRF with a standing appropriation in the *Training Guarantee (Administration) Act 1990* (Cth) from the CRF to the Training Guarantee Fund addressing the requirements of s 81 of the *Constitution*.[216] The authority to expend the moneys credited to the trust account were then found in either the *Training Guarantee (Administration) Act 1990* (Cth)[217] or the *Audit Act 1901* (Cth),[218] and addressing the requirements of s 83 of the *Constitution*.[219] Significantly the joint judgment expressly rejected the plaintiff's contention that the moneys paid under the *Training Guarantee (Administration) Act 1990* (Cth) bypassed the CRF, instead accepting that the Training Guarantee Fund was 'something different and apart from the [CRF]'.[220] Unfortunately, the joint judgment was not clear about when the moneys left the CRF, and whether this was on appropriation to the trust account or on exercising the authority to expend.

Dawson J focussed on the Trust Fund under the *Audit Act 1901* (Cth) and that the Training Guarantee Fund was a Trust Fund trust account.[221] As a consequence, he considered that amounts paid under the *Training Guarantee (Administration) Act 1990* (Cth) 'must initially form part of the [CRF] and must therefore, having regard to s 81 of the *Constitution*, be appropriated to the Trust Fund before they can be regarded as constituting part of that [Trust] Fund'.[222] The distinct and separate nature of the Trust Fund from the CRF was apparent, according to Dawson J, from the decision in the *New South Wales v Commonwealth* finding that moneys appropriated out of the CRF to the Trust Fund were not part of the 'surplus revenue'.[223] Once the amounts were appropriated to the Trust Fund an authority to expend those amounts was then found in the *Audit Act 1901* (Cth) trust account standing appropriation.[224] However, he also considered that the *Training Guarantee (Administration) Act 1990* (Cth) might itself provide the same authority.[225] Unfortunately he did not clarify whether moneys left the CRF on crediting the trust account or on expenditure according to the *Training Guarantee (Administration) Act 1990* (Cth).

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214 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 577-578 (Mason CJ, Deane, Toohey and Gaudron JJ), 584-585 (Brennan J), 593 (Dawson J), 603 (McHugh J).
215 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 572-573 (Mason CJ, Deane, Toohey and Gaudron JJ).
216 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 576-577 (Mason CJ, Deane, Toohey and Gaudron JJ).
217 *Training Guarantee (Administration) Act 1990* (Cth) s 34(1).
218 *Audit Act 1901* (Cth) s 62A(6).
219 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 577-578 (Mason CJ, Deane, Toohey and Gaudron JJ).
220 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 572 (Mason CJ, Deane, Toohey and Gaudron JJ).
221 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 591-592 (Dawson J).
222 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 592 (Dawson J).
223 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 592 (Dawson J).
224 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 593 (Dawson J).
225 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 593 (Dawson J).

McHugh J traced the historical development of the English Consolidated Fund from its origins as a collection together of many separate accounts that had been used to trace the collection of tax and its expenditure for the specific purpose for which it was collected.[226] This model of the Consolidated Fund, according to McHugh J, was then applied as the CRF detailed in s 81 of the *Constitution*.[227] Hence:

> The [CRF] is an abstraction which is descriptive of the totality of moneys received "by the Executive Government of the Commonwealth" irrespective of where it happens to be held. Once moneys are received by the Executive Government, they become part of the [CRF] by force of s 81 of the *Constitution* … the purpose … is not to ensure that revenue raised by the Commonwealth is held in any particular bank account or at any particular place but to ensure that once moneys are received by the Commonwealth they are not expended except under the authority of Parliament'.[228]

McHugh J then characterised the arrangements under the *Training Guarantee (Administration) Act 1990* (Cth) so that moneys received under the Act became part of the CRF, and that 'the moneys standing to the credit of the Trust Fund remain part of the [CRF] unless and until they have been appropriated by Parliament'.[229] He then considered that the *Training Guarantee (Administration) Act 1990* (Cth) was a valid appropriation by a combination of directing moneys to the Training Guarantee Fund and then authorising expenditures from that trust account for the 'purposes of the Commonwealth'.[230] Unfortunately it is not entirely clear whether the moneys ceased to be part of the CRF on appropriation or on some other event such as expenditure.

Meanwhile Brennan J considered that moneys paid to the Commonwealth 'form part of the CRF from the moment when they are received and that those moneys, though they are immediately credited to the Training Guarantee Fund, remain part of the CRF until they are disbursed'.[231] In short, Brennan J characterised the transaction as an employer payment into the CRF that was then appropriated by the *Training Guarantee (Administration) Act 1990* (Cth) with the money leaving the CRF on its disbursement from the Training Guarantee Fund according to the *Training Guarantee (Administration) Act 1990* (Cth).[232] He also considered, albeit as 'a question of interest but not of practical difficulty', that the *Audit Act 1901* (Cth) provided a valid appropriation 'with little or no work to do'.[233] Significantly, Brennan J stated that '[a]s it stands, s 81 appears to stamp the character of the CRF on all Commonwealth revenue raised and all moneys received by the Executive Government, irrespective of source', although he did not find it necessary to determine the categories of moneys that formed the CRF (such as revenue receipts and non-revenue receipts such as loan payments).[234]

Following the repeal of the *Audit Act 1901* (Cth),[235] the *Financial Management and Accountability Act 1997* (Cth) (as passed) maintained the distinction between the 'Consolidated Revenue Fund' and the Loan Fund, although *all* revenues and moneys received by the Commonwealth as 'public money'[236]

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[226] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 598-599 (McHugh J).
[227] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 599 (McHugh J).
[228] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 599 (McHugh J).
[229] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 602 (McHugh J).
[230] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 603 (McHugh J).
[231] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 584-585 (Brennan J).
[232] Presumably, the payments of amounts authorised by the *Training Guarantee (Administration) Act 1990* (Cth) ss 33, 34 to the Commonwealth are 'notional' payments and that these amounts remain part of the CRF: see *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 583 (Brennan J).
[233] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 583-584 (Brennan J).
[234] *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 580-581 (Brennan J).
[235] *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth) s 3 and sch 1.
[236] Being 'money in the custody or under the control of the Commonwealth' or 'money in the custody or control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money', and these both included 'money that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth':

was to be credited to the 'Consolidated Revenue Fund'[237] (unless it was 'special public money'[238] or overdraft drawings),[239] and any borrowed moneys were to be transferred to the Loan Fund.[240] Amounts from either the 'Consolidated Revenue Fund' or Loan Fund could then be transferred to 'components' of the Reserve Money Fund[241] and the Commercial Activities Fund[242] that were a 'purpose based' replacement for the Trust Fund.[243] The *Financial Management Legislation Amendment Act 1999* (Cth) then merged the Loan Fund and the 'components' of the Reserve Money Fund and the Commercial Activities Fund into the single CRF.[244] Significantly, 'special public money' and overdraft drawings ceased to be classed separately and merely formed part of the same common CRF.[245] The 'new' Special Accounts preserved the rights and obligations of the 'components' of the Reserve Money Fund and Commercial Activities Fund,[246] but hypothecated amounts for specific (designated) purposes, supported by an appropriation.[247] In addition to these formal legislative changes, the Australian Government also adopted the view that the terms 'raised and received' no longer required amounts to be physically credited to a central ledger before becoming part of the CRF; instead any amount 'raised and received' automatically become part of the CRF – the 'self-executing CRF'.[248] The 'self-executing CRF' also enabled the use of non-lapsing appropriations so that there was no longer a requirement to set aside amounts from the CRF to another place to avoid lapsing the appropriation each year,[249] and this has been accepted by the Parliament in subsequent Appropriation Bills.[250]

Financial Management and Accountability Act 1997 (Cth) s 5. Notably, 'special public money' is a subset of 'public money' (s 5 and s 16).

237 *Financial Management and Accountability Act 1997* (Cth) s 18 (as passed in 1997). For an illustration of the model illustrating typical transfers see Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Inquiry into the Draft Financial Framework Legislation Amendment Bill*, Report 395 (2003) app J.

238 Being 'public money that is not held on account of the Commonwealth or for the use or benefit of the Commonwealth' according to Special Instructions issued by the Finance Minister: *Financial Management and Accountability Act 1997* (Cth) s 16. The note to this section provides 'Money held on trust for another person is an example of special public money'; although note that the place of the Commonwealth as a trustee of money may not result in that money being outside, or separate from, the CRF.

239 *Financial Management and Accountability Act 1997* (Cth) s 8 (as passed in 1997). Notably this did not include 'advances' made according to s 38.

240 *Financial Management and Accountability Act 1997* (Cth) s 19 (as passed in 1997).

241 *Financial Management and Accountability Act 1997* (Cth) s 20 (as passed in 1997).

242 *Financial Management and Accountability Act 1997* (Cth) s 21 (as passed in 1997).

243 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, pp 8345-8346 (John Fahey, Minister for Finance); Commonwealth, *Parliamentary Debates*, Senate, 5 March 1997, p 1352 (Ian Campbell, Parliamentary Secretary to the Treasurer).

244 See Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Inquiry into the Draft Financial Framework Legislation Amendment Bill*, Report 395 (2003) app J. See also Department of Finance and Administration, *Reserved Money Fund (RMF) and Commercial Activities Fund (CAF) – Transition to 'Special Accounts'*, Finance Circular 1999/03; Department of Finance and Administration, *Guidelines for the Management of Special Accounts*, Financial Management Guidance No 7 (2003).

245 See *Financial Management and Accountability Act 1997* (Cth) ss 8 and 17 (as passed in 1997).

246 *Financial Management Legislation Amendment Act 1999* (Cth) s 5. See also Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) 6.

247 *Financial Management and Accountability Act 1997* (Cth) ss 20(4) and 21(1). The term 'hypothecated' also includes situations where the Commonwealth holds money as a genuine trustee, for States, as part of a business operation, and so on: see Commonwealth, *Committee Hansard*, Joint Committee of Public Accounts and Audit, 7 March 2004, PA8 (Ian McPhee).

248 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 1999, p 2284 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration); Commonwealth, *Parliamentary Debates*, Senate, 22 March 1999, p 2914 (Jocelyn Newman, Minister for Family and Community Services and Minister Assisting the Prime Minister for the Status of Women); Minister for Finance and Deregulation, *Budget: Agency Resourcing*, Budget Paper No 4 (2008) p 1. See also Department of Finance and Administration, *Appropriations and the Consolidated Revenue Fund*, Finance Circular No 2004/06 (2004); Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004-05 (2004) p 32.

249 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 1999, p 2284 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration); Commonwealth, *Parliamentary Debates*, Senate, 22 March 1999, p 2914 (Jocelyn Newman, Minister for Family and Community Services and Minister Assisting the

Despite the ambiguities and uncertainties following the *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (and the *New South Wales v Commonwealth*) the Australian Government has articulated its conception of the nature and composition of the CRF:

- The CRF is 'self-executing'. That is, all revenues or moneys received by the Commonwealth automatically form part of the CRF, whether or not the Commonwealth has credited those moneys to a fund or account which is designated as part of the CRF.
- The CRF includes money borrowed by the Commonwealth and 'trust money', as well as money in the nature of revenue. As a result, an appropriation is required to spend all such money, including that held on trust.
- The wide range of circumstances in which Commonwealth money is raised or received makes it *impracticable to identify the precise balance of the CRF* at any particular time (emphasis added).[251]

The effect of the *Financial Management Legislation Amendment Act 1999* (Cth) and the interpretation of the High Court's decisions by the Australian Government (and in particular Brennan J's approach in the *Northern Suburbs General Cemetery Reserve Trust v Commonwealth*) removed the need for fund accounting through a central ledger[252] and opened the way for accrual budgeting.[253] This was a significant change, perhaps even 'profound',[254] because the focus moved from cash transactions and cash balances to the financial affects of transactions and events when they occur.[255] The consequence has been to fragment the locations and contents of the CRF from a central cash ledger to a multitude of accrual ledgers throughout the Commonwealth. Significantly, however, the Parliament has provided a broad delegation to the Finance Minister through the *Financial Management and Accountability Act 1997* (Cth), and subject only to disallowance by the Parliament,[256] to establish the accounting principles and standards that determine the boundaries and dealings with amounts that comprise the CRF.[257] In effect, the Parliament has given over the details of the CRF's determination to the Australian Government.

Prime Minister for the Status of Women). See also Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 12 and 27-30.

250 The Long Title of appropriation bills now provides: '[a]n Act to appropriate money out of the [CRF] for the ordinary annual services of the Government, and for related purposes' (for example, *Appropriation Act (No 1) 2007-2008* (Cth)). The earlier Long Title provided, for example, '[a]n Act to appropriate money out of the [CRF] for the service of the year ending on 30 June 2000, and for related purposes': *Appropriation Act (No 1) 1999-2000* (Cth).

251 Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004-05 (2004) pp 32-33. See also Commonwealth, *Committee Hansard*, Senate Finance and Public Administration Legislation Committee (Estimates), 15 February 2005, F&PA 53 (Ian McPhee); Department of Finance and Administration, *Appropriations and the Consolidated Revenue Fund*, Finance Circular No 2004/06 (2004); Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Inquiry into the Draft Financial Framework Legislation Amendment Bill*, Report 395 (2003) pp 66-67 and app J.

252 See Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) pp 1 and 6.

253 See Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 1999, p 2284 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration); Commonwealth, *Parliamentary Debates*, Senate, 22 March 1999, p 2913 (Jocelyn Newman, Minister for Family and Community Services and Minister Assisting the Prime Minister for the Status of Women); Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) pp 1 and 6.

254 See Maurice Kennedy, *Cheques and Balances*, Parliamentary Library Research Paper No 16 (2002) p ii.

255 See Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 6-10. See also Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) pp 1 and 6.

256 The 'Finance Minister's Orders' are subject to disallowance by the Parliament: *Financial Management and Accountability Act 1997* (Cth) s 63(3).

257 See *Financial Management and Accountability Act 1997* (Cth) ss 48(1) and 63; amended *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2009* (Cth) o 3, sch 1. Notably a similar situation existed under the *Audit Act 1901* (Cth) s 40.

This may have been ameliorated, in part, with the reporting of cash balances according to the *Charter of Budget Honesty Act 1998* (Cth) of moneys actually held by the Commonwealth,[258] and information about the true costs and liabilities incurred by the Commonwealth (such as outstanding employee entitlements).[259] Further, since 2002 the Australian Government has also attempted to quantify the cash balances of the CRF, albeit noting that '[t]here is … no requirement for the [CRF] to be accounted for in any particular form'.[260] The CRF is quantified, '[f]or practical purposes', as the total Australian Government's General Government Sector cash,[261] less the cash controlled and administered by bodies under the *Commonwealth Authorities and Companies Act 1997* (Cth),[262] plus 'special public moneys'.[263] The Parliament appears to have accepted the methodology for calculating the CRF, the Australian Government's conception of the *Constitution*'s CRF,[264] that there are significant amounts held by the Commonwealth outside the bounds of the CRF,[265] and the uncertainty about where the boundaries of the CRF may lie at any given point in time.[266] This result undoubtedly owes its beginnings to the High Court's early pronouncement about the surplus revenue and obviating the need to precisely define the balance of the CRF. The nature of the surplus revenue is considered next.

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[258] See, for example, the Commonwealth's Final Budget Outcomes: Department of Finance and Administration, *Final Budget Outcome 2006-07* (2007) p 46.

[259] See, for example, *Appropriation Act (No 1) 2005-2006* (Cth) sch 1 and *Portfolio Budget Statements* setting out in detail the full cost of the price of outputs forming the appropriation.

[260] Department of Finance and Administration, *Consolidated Financial Statements for the Year Ended 30 June 2003* (2003) p 160. See also Department of Finance and Administration, *Consolidated Financial Statements for the Year Ended 30 June 2007* (2007) p 159.

[261] The General Government Sector, in contrast to the Public Non-financial Corporations Sector and the Public Financial Corporations Sector, is the '[g]overnment departments and agencies that provide non-market public services and are funded mainly through taxes': see, for example, Department of Finance and Administration, *Consolidated Financial Statements for the Year Ended 30 June 2007* (2007) pp 27 and 60. See also Australian Bureau of Statistics, *Australian System of Government Finance Statistics: Concepts, Sources and Methods*, Cat No 5514.0.55.001 (2005) p 256 ('General Government Sector'); Australian Accounting Standards Board, *Financial Reporting of General Government Sectors by Governments*, AASB 1049 (2006) p 29.

[262] That is bodies under the *Commonwealth Authorities and Companies Act 1997* (Cth) that are 'financially autonomous incorporated Commonwealth bodies that can acquire legal ownership in their own right': Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8346 (John Fahey, Minister for Finance).

[263] 'Special public moneys' are 'public money that is not held on account of the Commonwealth or for the use or benefit of the Commonwealth' such as '[m]oney held by the Commonwealth on trust for another person' where 'public money' means '(a) money in the custody or under the control of the Commonwealth; or (b) money in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money; including such money that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth': *Financial Management and Accountability Act 1997* (Cth) ss 5 and 16. See also Minister for Finance and Administration, *Special Instruction Regarding Special Public Money 2003/01* (2003); Department of Finance and Administration, *Special Instruction regarding Special Public Money*, Finance Circular 2003/10 (2003).

[264] Albeit, there has been some recent concerns about the formal requirements of identifying an appropriation and accounting for the expenditure under the appropriation: see, for example, Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004-05 (2004) pp 13-14. See also Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 18-19; Standing Committee for the Scrutiny of Bills, Senate, *Fourteenth Report of 2005: Accountability and Standing Appropriations* (2005) pp 271-272.

[265] This now includes investments under *Financial Management and Accountability Act 1997* (Cth) s 39 and amounts held by *Commonwealth Authorities and Companies Act 1997* (Cth) bodies (except those holding 'public money' in respect of that 'public money': *Financial Management and Accountability Regulations 1997* (Cth) r 5 and sch 1 (pt 2)). See also Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004-05 (2004) pp 33-37 (s 39) and 65-67 (bodies). Notably the amounts collected as taxation under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) are now considered to be part of the CRF, although they had previously be considered a 'State tax' collected by the Commonwealth: see Department of Finance and Administration, *Consolidated Financial Statements for the Year Ended 30 June 2007* (2007) p 1; Minister for Finance and Deregulation, *Budget: Strategy and Outlook*, Budget Paper No 1 (2008) pp 5-26.

[266] See, for example, Commonwealth, *Committee Hansard*, Senate Finance and Public Administration Legislation Committee (Estimates), 14 February 2005, F&PA 173 (Brian Boyd). The only concern appears to be the over-expenditure of an appropriation: see Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 18-19.

7.5 Surplus revenue

During the five years after uniform customs duties were imposed, and 'until the Parliament otherwise provides', the *Constitution* provided for the Commonwealth to account to the States,[267] and thereafter make payments to the States 'on such basis as it [the Parliament] deems fair' of 'all surplus revenue of the Commonwealth'.[268] Significantly, the *Constitution* did not set out how the repayments of the surplus were to be determined or how they were to be paid.[269] After the five-year transition period the Parliament enacted the *Surplus Revenue Act 1908* (Cth) that, in part, ceased the operation of accounting for customs duties to the States in the transition period,[270] and introduced a scheme to 'ascertain the balance of revenue over expenditure' each month and 'pay that balance to the States as surplus revenue'.[271] The sting was that the legislation also provided for 'all payments to Trust Accounts, established under the *Audit Act 1901-1906*, of money appropriated by law for any purpose of the Commonwealth shall be deemed to be expenditure',[272] and further, these appropriations did not lapse.[273] This meant that the amounts appropriated were no longer part of the surplus revenue of the Commonwealth, and they were dealt with as if they were already expended for the purpose of calculating the surplus revenue to be paid to the States. The validity of the *Surplus Revenue Act 1908* (Cth) arrangements were challenged by a State when amounts appropriated were not disbursed during the financial year (albeit deemed expended) and those amounts were not included in the surplus revenue calculations and payments.[274]

New South Wales v Commonwealth (1908) 7 CLR 179

In the *New South Wales v Commonwealth* (see also ¶7.4, p 204) the plaintiff State contended that these unexpended appropriated amounts ought to be distributed among the States and that attempts to set aside future disbursements was outside the Parliament's powers under the *Constitution*.[275] The High Court concluded that lawful appropriations had the effect of segregating the revenue and money of the Commonwealth so that it did not enter into the calculation of the surplus revenue due to the States under to the *Constitution*.[276] The validity of the *Surplus Revenue Act 1908* (Cth) was not challenged as the parties *only* sought the High Court's decision about whether a sum of £162 000 – being New South Wales' share of the alleged surplus revenue – was lawfully deducted from the balance payable to the States.[277] The question in issue was whether the £432 000 (£250 000 plus £182 000) appropriated, but not paid out of the Invalid and Old-Age Pensions Fund, was a Commonwealth 'expenditure',[278] and therefore outside the calculation of the surplus revenue. The High Court concluded that it was and so too were the other amounts appropriated but not yet paid

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[267] *Constitution* s 93.

[268] *Constitution* s 94.

[269] This reflects the difficulty of achieving an agreement during the *Constitution*'s drafting: see John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 218-219.

[270] *Surplus Revenue Act 1908* (Cth) s 3.

[271] *Surplus Revenue Act 1908* (Cth) s 4(3).

[272] *Surplus Revenue Act 1908* (Cth) s 4(4)(d).

[273] *Surplus Revenue Act 1908* (Cth) s 5.

[274] The details of the arrangements are set out in *New South Wales v Commonwealth* (1908) 7 CLR 179 at 180-181.

[275] *New South Wales v Commonwealth* (1908) 7 CLR 179 at 180-181.

[276] *New South Wales v Commonwealth* (1908) 7 CLR 179 at 191 (Griffith CJ), 197 (Barton J), 199 (O'Connor J), 203 (Isaacs J), 206 (Higgins J). See also *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.

[277] See *New South Wales v Commonwealth* (1908) 7 CLR 179 at 181.

[278] The plaintiff contending that the calculation of the Commonwealth's surplus revenue required the deduction of the revenue and money actually collected from those expended or disbursed, thus the meaning of 'expenditure' in the *Constitution* s 89 governs the meaning of 'surplus' in s 94: see *New South Wales v Commonwealth* (1908) 7 CLR 179 at 188-189 (Griffith CJ).

to the credit of the trust accounts. Chief Justice Griffiths[279] and Justices Barton,[280] O'Connor,[281] Isaacs[282] and Higgins[283] all expressed a similar view, and in the words of Chief Justice Griffiths:

> The Appropriation Act does … operate as a provisional setting apart or diversion from the [CRF] of the sum appropriated by the Act. So far, therefore, as regards the ascertainment of a surplus for any given period, all moneys the expenditure of which during the period is authorised must be taken into account in making up the provisional balances. It is entirely in the discretion of the Parliament when authorising the expenditure of the public revenue to fix the period during which it may be disbursed. It follows that, if a sum of money is lawfully appropriated out of [the CRF] for a specific purpose, that sum cannot be regarded as forming part of a surplus until the expenditure of it is no longer lawful or no longer thought necessary by Government.[284]

Northern Suburbs General Cemetery Reserve Trust v Commonwealth (1993) 176 CLR 555

Later in the *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (see also ¶7.4, p 205) the High Court made some comments about the *New South Wales v Commonwealth*.[285] Significantly, Brennan J considered that the *New South Wales v Commonwealth* established in the context of the *Training Guarantee (Administration) Act 1990* (Cth) under consideration that moneys ceased to be part of the CRF on withdrawal, and that they were expenditure for the purposes of 'surplus revenue' when they were appropriated (that is, credited) to the Training Guarantee Fund.[286] As set out above, however, the other justices were unclear about when an amount actually left the CRF.[287]

The significance of the *New South Wales v Commonwealth* was to remove a key measure of accountability for Commonwealth expenditure[288] and validate an Australian Government strategy, with the approval of the Parliament, to avoid the distribution of any surplus revenue to the States under the *Constitution* by merely appropriating a similar amount to take it outside the surplus revenue calculations.[289] Thus, while the surplus revenue provisions still apply,[290] the Australian Government has effectively circumvented their affect so that the present-day Australian Government considers

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279 *New South Wales v Commonwealth* (1908) 7 CLR 179 at 190-191 (Griffith CJ).
280 *New South Wales v Commonwealth* (1908) 7 CLR 179 at 193-194 (Barton J).
281 *New South Wales v Commonwealth* (1908) 7 CLR 179 at 199 (O'Connor J).
282 *New South Wales v Commonwealth* (1908) 7 CLR 179 at 199-202 (Isaacs J).
283 *New South Wales v Commonwealth* (1908) 7 CLR 179 at 205-206 (Higgins J).
284 *New South Wales v Commonwealth* (1908) 7 CLR 179 at 190-191 (Griffith CJ).
285 See *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 584 (Brennan J), 592 (Dawson J), 600 (McHugh J).
286 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 584 (Brennan J).
287 See *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 572-578 (Mason CJ, Deane, Toohey and Gaudron JJ), 590-594 (Dawson J), 597-603 (McHugh J).
288 This conclusion relies on the proposition that the purpose of the *Constitution* s 94 was more than just the return of surplus revenue to the States. While this proposition is open to speculation, it seems likely that there was a measure of 'accountability' intended by this and the other financial provision all together because the States were concerned that the new Commonwealth should be economical with the expenditure of the 'States" revenues and moneys: see, for example, John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 169-171.
289 This is a profound rebalancing of the relations between the States and the Commonwealth, essentially placing financial control of the States within the ambit of the Commonwealth: see, for examples, Michael Coper, *Encounters with the Australian Constitution* (1987) pp 204-242; A Hannan, 'Finance and Taxation' in R Else-Mitchell, *Essays on the Australian Constitution* (1961) pp 247-273. As a measure of the significance of the amounts of 'surplus revenue' that might be involved, the 2008 Budget Papers provided: 'The Government … will invest most of the 2007-08 and 2008-09 Budget *surpluses* in three new funds for *education*, *health* and *infrastructure* for long-term investment to build a modern nation … An underlying cash surplus of $21.7 billion (1.8 per cent of GDP) is expected in 2008-09 – the largest surplus as a proportion of GDP since 1999-00 – with further strong surpluses projected in the following three years' (emphasis added): Minister for Finance and Deregulation, *Budget: Strategy and Outlook*, Budget Paper No 1 (2008) p 1-1.
290 The *Surplus Revenue Act 1908* (Cth) s 3 provides for the effective ceasing of the *Constitution* s 93, the *Surplus Revenue Act 1910* (Cth) s 2 provides for the effective ceasing of the *Constitution* s 87, and to comply with the *Constitution* s 94 the *States Grants Act 1927* (Cth) s 5 provides that the 'Treasurer shall pay to the several States of the Commonwealth, in proportion to the number of their people, any surplus revenue in his hands at the close of the financial year commencing on the first day of July 1927, and at the close of each financial year thereafter'. See also *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 358 (Barwick CJ). See also Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004-05 (2004) p 38.

that 'the existence of current accrual appropriations in excess of the balance of the [CRF] will prevent the latter from being characterised as "surplus revenue" for the purposes of s 94 of the *Constitution*'.[291] Perhaps the most surprising aspect in considering the surplus revenue question is the Australian Government's apparent re-characterisation of the entire constitutional compromise as voluntary Commonwealth largesse, rather than a constitutional obligation:[292]

> It was always envisaged when the *Constitution* was being drafted that the Commonwealth would raise more revenue than it would need to perform its core functions. Consequently, explicit provisions were included to *allow* the Commonwealth to transfer surplus revenue in the form of general revenue assistance to the States (emphasis added).[293]

The Australian Government still does calculate the surplus revenue according to the following formula: the balance of the CRF plus the other amounts invested,[294] and then subtracts un-drawn appropriations for specified amounts, the amounts specified in the annual Appropriation Bills, standing appropriations for debt repayment that are quantifiable and certain with respect to the due date for payment, and the balance of all Special Accounts.[295] The Australian Government considers that '[a]s far as can reasonably be determined, *no* surplus revenue of the Commonwealth has existed for distribution since 1908-09'.[296] While the States appear to accept this calculation,[297] there seems little doubt that a precise calculation of the surplus revenue in the form of its conception at Federation as a cash balance is now almost impossible.[298] As a consequence, the Australian Government, with the support and approval of the High Court and Parliament, has undermined a key restriction on linking appropriations to the amounts of money actually held by the Commonwealth (and within the CRF). In effect, breaking the link between appropriations and a calculation of the amounts of money actually held by the Commonwealth means that Parliamentary scrutiny of appropriations may no longer be a good proxy for the accountability and transparency of expenditure because appropriations exceed the amounts of actual money. This conclusion becomes even more likely when the formal requirements for appropriations are considered next.

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[291] Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997*, Report 374 (2000) 12.

[292] This change in the Federation's fiscal balance (comprising the 'vertical fiscal imbalance' and 'horizontal fiscal equalisation': see Minister for Finance and Deregulation, *Budget: Agency Resourcing*, Budget Paper No 3 (2008) pp 3-4) has affected some of the High Court's deliberation: see, for example, *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 354-358 (Barwick CJ). For an overview of these financial expenditure arrangements, and in particular the role of the *Constitution* s 96, see Cheryl Saunders, 'The Development of the Commonwealth Spending Power' (1978) 11 *Melbourne University Law Review* 369 at 389-396. Notably, the term 'may' in the *Constitution* s 94 has a 'mandatory' faculty: see *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 358-359 (Barwick CJ).

[293] Minister for Finance and Deregulation, *Budget: Agency Resourcing*, Budget Paper No 3 (2008) p 3. Notably, the States rely on Commonwealth financial assistance to meet between 40-80 per cent of their average funding requirement, and this is made up of all GST revenue, more than 90 different payments for specific purposes and a small amount of other general revenue assistance (at 3). None of this is now characterised as 'surplus revenue'.

[294] See *Financial Management and Accountability Act 1997* (Cth) s 39.

[295] See Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004-05 (2004) pp 37-38.

[296] Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004-05 (2004) p 38 citing the advice from the Department of Finance and Administration in October 2004. See also Department of the Treasury, *Annual Report 2006-07* (2007) p 229; Department of the Treasury, *Annual Report 2005-06* (2006) p 232; Department of the Treasury, *Annual Report 2004-05* (2005) p 216; Department of the Treasury, *Annual Report 2003-04* (2004) pp 247-248.

[297] There does not appear to have been such a request since 1910: see Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004-05 (2004) p 37; Commonwealth, *Committee Hansard*, Senate Finance and Public Administration Legislation Committee (Estimates), 15 February 2005, F&PA 66 (Ian Watt).

[298] See Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004-05 (2004) pp 32-33; Department of Finance and Administration, *Appropriations and the Consolidated Revenue Fund*, Finance Circular No 2004/06 (2004); Maurice Kennedy, *Cheques and Balances*, Parliamentary Library Research Paper No 16 (2002) pp 34-38.

7.6 Appropriations

Since Federation there has been a proliferation of the forms of appropriation in addition to the annual Appropriation Acts.[299] These include Special (or Standing) Appropriations,[300] Special Accounts (from the progenitor *Audit Act 1901* (Cth) Trust Fund trust accounts),[301] Net Appropriation Agreements,[302] Advance to the Finance Minister,[303] and Recoverable GST.[304] Each of these appropriations is subject to some constraint by the *Constitution*. Section 83 of the *Constitution* provides that *any* 'money' that is 'drawn' from the 'Treasury of the Commonwealth' requires an 'appropriation made by law'.[305] Where that is moneys derived from the CRF,[306] s 81 then requires that the appropriation must be for 'the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this *Constitution*'.[307] In effect, this means that the Parliament must have passed an appropriation law,[308] with the exception of appropriations found in the

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[299] Notably, in addition to these appropriations there are other appropriation-like arrangements: the non-lapsing of appropriations carrying amounts across years, and tax expenditures, and until recently, the Goods and Services Tax: see Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 27-36.

[300] These are appropriations by Acts other than the annual Appropriations Acts and which generally continue for longer than a financial year. See Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 15-18. Notably this form of appropriation now accounts for approximately 80% of amounts appropriated: see Standing Committee for the Scrutiny of Bills, Senate, *Fourteenth Report of 2005: Accountability and Standing Appropriations* (2005) p 270.

[301] These are a mechanism in Acts or determinations used to record amounts in the in the CRF that are set aside for designated purposes with a Standing Appropriation up to the balance of the Special Account: *Financial Management and Accountability Act 1997* (Cth) ss 20 and 21. See also Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 19-21.

[302] These are a mechanism used to direct amounts received from non-appropriated sources to appropriated 'departmental items' that are appropriated (according to 'net appropriations') in the annual Appropriation Acts: *Financial Management and Accountability Act 1997* (Cth) s 31. See also Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 22-26; Australian National Audit Office, *Management of Net Appropriation Agreements*, Audit Report No 28 2005-06 (2005).

[303] This is a mechanism whereby the annual Appropriation Act authorise the Finance Minister to approve expenditure as a contingency for urgent funding where the appropriated funds prove to be insufficient or a new appropriation is required. See also Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 33-35.

[304] These are the amounts of recoverable GST incurred by agencies that are added to their annual Appropriation Act appropriations: *Financial Management and Accountability Act 1997* (Cth) s 30A. See also Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 36-37.

[305] Notably, *Auckland Harbour Board v R* [1924] AC 318 at 326 (Viscount Haldane) is commonly cited as authority for the proposition that an 'appropriation made by law' is necessary: see, for examples, *Combet v Commonwealth* (2005) 224 CLR 494 at 597-598 (Kirby J); *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 597 (McHugh J); *Brown v West* (1990) 169 CLR 195 at 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 392 (Mason J). This may not, however, be so certain, as the decision stated 'no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself', the term 'authorisation' arguably including something less than a 'law', while what is required is probably something more than just a 'vote or resolution of either or both Houses of the Parliament': *Combet v Commonwealth* (2005) 224 CLR 494 at 558 (Gummow, Hayne, Callinan and Heydon JJ).

[306] Theoretically, there may be money that was part of the CRF, was moved out of the CRF with a relevant appropriation while remaining part of the 'Treasury of the Commonwealth' (satisfying the requirements of the *Constitution* s 81) and that the government seeks to expend that will not be captured by this provision, although an appropriation law will still be required (to satisfy the requirements of the *Constitution* s 83).

[307] *Constitution* s 81. Notably the High Court has been unable to find meaning for the terms 'in the manner' and 'subject to the charges and liabilities' in the *Constitution* s 81: see *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 253 (Latham CJ).

[308] An issue of construction is where the source of power to appropriate is found in the *Constitution*, although this is almost certainly now settled as the *Constitution* s 81: see *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 392 (Mason J); *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 454 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

Constitution itself,[309] and restricts any expenditure to 'the purposes of the Commonwealth'.[310] The critical question is how constrained must the appropriation law be in proscribing the 'purposes of the Commonwealth'?[311] This in turn poses two questions: what are the boundaries of the Commonwealth's purposes, and how precisely must those purposes be articulated? The High Court decisions show over time that these are contentious and difficult questions to resolve, essentially leaving considerable latitude to the Parliament in the form and content of a valid appropriation law. These questions are now considered in turn.

7.6.1 What are the Commonwealth's purposes?

It remained unclear from the Constitutional Conventions what limits, if any, were contemplated on the scope of valid appropriation purposes.[312] The subsequent High Court decisions do not definitively settle the boundaries of the power, with the uncertainty arising where the Commonwealth Parliament seeks to appropriate for purposes beyond the clear legislative powers set out in the *Constitution*.[313] The detail of the High Court's decisions illustrate the diversity of perspectives and the difficulty in determining the boundaries of the Commonwealth's purposes.

Attorney-General for Victoria v Commonwealth (1945) 71 CLR 237

The first substantial High Court decision addressing this question,[314] *Attorney-General for Victoria v Commonwealth* (the *Pharmaceutical Benefits case*), concerned the validity of the *Pharmaceutical Benefits Act 1944* (Cth) that appropriated moneys for the purposes of a pharmaceutical benefits scheme. The Attorney-General for Victoria on behalf of some of the members of the Medical Society of Victoria challenged the validity of the *Pharmaceutical Benefits Act 1944* (Cth) as outside the scope of the Commonwealth's legislative powers.[315] Essentially there was a Trust Fund trust account[316] established by the *National Welfare Act 1943* (Cth) that provided an appropriation, and for payments

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309 See *Constitution* ss 3, 48, 66, 72(iii), 83, 84, 85(iii), 85(iv), 87, 89, 93, 94, 105, 105A and 122. Although whether these do effect an appropriation is not settled: see, for example, *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 353 (Barwick CJ) and the references therein. See also *Brown v West* (1990) 169 CLR 195 at 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

310 An issue of construction that has caused some concern to the High Court has been that the *Constitution* s 81 (and s 83) refers only to 'appropriated' (and 'appropriation') and whether there is a requirement for separate power to 'expend' any amounts appropriated: see *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 251 (Latham CJ); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 392 (Mason J). See also Cheryl Saunders, 'The Development of the Commonwealth Spending Power' (1978) 11 *Melbourne University Law Review* 369 at 396-407.

311 Another related question is determining who has standing to bring such an action: see Charles Lawson, '"Special Accounts" under the *Constitution*: Amounts Appropriated for Designated Purposes' (2006) 29 *University of NSW Law Journal* 114 at 128-129.

312 See Cheryl Saunders, 'The Development of the Commonwealth Spending Power' (1978) 11 *Melbourne University Law Review* 369 at 375-379. Notably, early commentators were also uncertain about the intentions for these provisions at the time of the Constitutional Conventions and their likely interpretations: see, for examples, W Harrison Moore, *Constitution of the Commonwealth of Australia* (2nd ed, 1910) pp 524-525 (limited to 'federal purposes'); John Quick, *The Legislative Powers of the Commonwealth and the States of Australia* (1919) p 43 ('any purpose under the sun'); John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) p 666 ('the purposes in respect of which Parliament can make laws').

313 Albeit, if the purpose is identifiable within the legislative powers of the Commonwealth there is plainly power to appropriate (and expend): see *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55-56 (French CJ), 70 (Gummow, Crennan and Bell JJ), 133 (Hayne and Kiefel JJ), 213 (Heydon J); *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 454 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ); *Davis v Commonwealth* (1988) 166 CLR 79 at 95 (Mason CJ, Deane and Gaudron JJ), 104 (Wilson and Dawson JJ), 114-115 (Brennan J). Notably too, the Commonwealth Parliament has regularly legislated appropriation and schemes beyond its powers, such as arctic exploration, medical research, literary grants and pensions, public health, assistance to distressed Australians, and so on: see *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 50 (French CJ), 116 (Hayne and Kiefel JJ), 178 (Heydon J); *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 254 (Latham CJ).

314 The 'purposes of the Commonwealth' was addressed in passing in *New South Wales v Commonwealth* (1908) 7 CLR 179 at 192 (Barton J), 200 (Isaacs J), the justices accepting the purposes of the *Old-age Pensions Appropriation Act 1908* (Cth) and the *Coast Defence Appropriation Act 1908* (Cth) were within the *Constitution*'s legislative powers.

315 See *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 246 (Latham CJ).

316 *Audit Act 1901* (Cth) s 62A.

'directed by any law of the Commonwealth … in relation to health services, unemployment or sickness benefits, family allowances, or other welfare or social services'.[317] The *Pharmaceutical Benefits Act 1944* (Cth) then set out a scheme for payments in respect of 'pharmaceutical benefits' with a provision expressly providing for those payments to be made out of the *National Welfare Act 1943* (Cth) trust account: '[p]ayments in respect of pharmaceutical benefits shall be made out of the Trust Account established under the *National Welfare Fund Act 1943* [(Cth)] and known as the National Welfare Fund'.[318] The critical question for the High Court was whether the *Pharmaceutical Benefits Act 1944* (Cth) was a valid law for authorising the payment of Commonwealth moneys for the purposes set out in the *Pharmaceutical Benefits Act 1944* (Cth) based on an appropriation in the *National Welfare Act 1943* (Cth) and *Audit Act 1901* (Cth).[319] The plaintiffs contended that the 'purposes of the Commonwealth' in s 81 of the *Constitution* meant 'purposes for which the Commonwealth Parliament has powers to make laws'.[320] Meanwhile, the defendants contended that the *Constitution* s 81 itself provided an appropriation power (together with incidental expenditure powers: s 51(xxxix)) that was exercised by making laws that expended the appropriated amounts – in short, a power to make laws for any purpose linked with an appropriation including areas outside the Commonwealth's other constitutional competencies.[321] All the parties accepted that, other than s 81 and its incidental powers, there was no other constitutional legislating power enabling the *Pharmaceutical Benefits Act 1944* (Cth).[322] The justices' decisions reflect the ongoing graduation of contentions from almost any purposes to only those purposes for which there is express legislative powers.

Chief Justice Latham considered that the 'purposes of the Commonwealth' were broader than merely the powers to make laws identified in the *Constitution*.[323] He also considered that the valid purposes were 'general in the sense that it is for the Parliament to determine whether or not a particular purpose shall be adopted as a purpose of the Commonwealth'.[324] Further, he considered that 'in my opinion, the determination of whether a particular purpose should be regarded and adopted as a Commonwealth purpose is a political matter'.[325] He then concluded:

> … in my opinion, the provisions in s 81 can fairly be read as intended to mean that it is the Commonwealth parliament, and not any court, which is entrusted with the power, duty and responsibility to determining what purposes shall be Commonwealth purposes, as well as of providing for the expenditure of money for such purposes.[326]

However, in finding that the *Pharmaceutical Benefits Act 1944* (Cth) was invalid as an exercise of the Commonwealth's legislative powers, Latham CJ distinguished between laws providing for the expenditure of money, and a broad expansion of Commonwealth power to legislate beyond its stated constitutional powers under the guise of an expenditure law: '[a] company may have power to subscribe to a hospital or a football club without having power to conduct a hospital or to organise

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[317] See *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 249 (Latham CJ), 264 (Starke J), 280 (Williams J).
[318] *Pharmaceutical Benefits Act 1944* (Cth) s 17. See *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 249 (Latham CJ), 264 (Starke J), 267-268 (Dixon J), 279-280 (Williams J).
[319] See *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 248-249 (Latham CJ), 264 (Starke J), 267 (Dixon J), 273 (McTiernan J), 276 (Williams J).
[320] See *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 252 (Latham CJ), 276 (Williams J).
[321] See *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 252 (Latham CJ), 265 (Starke J), 269 (Dixon J), 280-281 (Williams J).
[322] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 249-250 (Latham CJ), 265 (Starke J), 268 (Dixon J).
[323] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 253 (Latham CJ).
[324] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 254 (Latham CJ).
[325] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 256 (Latham CJ). Notably, this was an argument following a similarly 'general power' subject to one qualification in the *Constitution* s 51 to make tax laws subject to being for the peace, order and good government of the Commonwealth, that too, was a matter that 'depends entirely upon the will of the Commonwealth Parliament' that is 'entirely a political matter' (at 255-256).
[326] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 256 (Latham CJ).

and control a football club'.[327] Chief Justice Latham considered that the *Pharmaceutical Benefits Act 1944* (Cth) sought to control doctors, chemists, drug sales, and dealings with doctors and chemists and conferred rights and duties, and as such, was a law outside the Commonwealth's legislative powers and so invalid.[328]

Along similar lines, Justice McTiernan considered that the 'purposes of the Commonwealth' were 'such purposes as the Parliament determines':[329]

> Any purpose for which the elected representatives of the people of the Commonwealth determine to appropriate the revenue is a purpose of the Commonwealth. If it were otherwise, judicial scrutiny of a purpose for which Parliament appropriated revenue could take place in order to determine whether the purpose was lawful or not. The *Constitution* puts the power of the purpose in the hands of the Parliament, not in the hands of the Courts. I think that the object of s 81 is to put this power in the hands of Parliament … When Parliament has appropriated revenue for any purpose the Court could not decide the question whether it was a purpose of the Commonwealth without entering into a consideration of matters of policy which are peculiar and exclusively within the legislative sphere.[330]

However, McTiernan J then qualified this broad proposition, finding valid any provisions that 'define, specify or limit the purpose to which the revenue is appropriated or because they are merely machinery for the expenditure of the money appropriated or provide safeguards for its due expenditure'.[331] Meanwhile a provision establishing a right to charge he considered was outside this scope and so invalid (and in this case severable from the remaining valid parts of the *Pharmaceutical Benefits Act 1944* (Cth)).[332]

The remaining justices were more circumscribed in their views. Justice Starke considered that the appropriation power in s 81 'must be construed liberally; it is a great constitutional power, but it does not authorise the Commonwealth appropriating its revenues and moneys for any purpose whatever "without regard to whether the object of expenditure is for the purpose of and incident to some matter which belongs to the Federal Government"'.[333] Meanwhile Justice Dixon, with whom Rich J agreed,[334] stated:

> … s 81 … is a provision in common constitutional form substituting for the usual words 'public service' the word 'purposes' of the Commonwealth only because they are more appropriate in a Federal form of government, and, on the other hand, that s 83, in using the words 'by law' limits the power of appropriation to what can be done by the enactment of a valid law. In deciding what appropriation laws may validly be enacted it would be necessary to remember what position a national government occupies and … to take no narrow view, but the basal consideration would be found in the distribution of powers and functions between the Commonwealth and the States.[335]

In concluding that the whole of the *Pharmaceutical Benefits Act 1944* (Cth) was invalid, Dixon J considered that the content of the legislation was 'not relevant to any power which the *Constitution* confers on the Parliament'.[336] Significantly, Dixon J expressly considered the claim that ss 81 and 83 authorised the Parliament to expend moneys without any limitations as to purposes.[337] In dealing with this proposition Dixon J concluded that this argument was not relevant because 'the

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[327] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 257 (Latham CJ).
[328] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 258-263 (Latham CJ).
[329] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 273 (McTiernan J).
[330] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 274 (McTiernan J).
[331] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 274-275 (McTiernan J).
[332] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 275 (McTiernan J).
[333] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 266 (Starke J) citing W Harrison Moore, *Constitution of the Commonwealth of Australia* (2nd ed, 1910) pp 523-527 (who considered the power was limited to 'federal purposes').
[334] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 264 (Rich J).
[335] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 271-272 (Dixon J).
[336] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 267 (Dixon J).
[337] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 268-269 (Dixon J).

Pharmaceutical Benefits Act 1944 (Cth) appropriation of money is the consequence of the plan: the plan is not consequential upon or incidental to the appropriation of money'[338] If the contrary had been in issue Dixon J opined that it would have been necessary 'to consider how much [of the *Pharmaceutical Benefits Act 1944* (Cth)] could be supported under s 81 and how much of the rest could be stripped from the enactment without changing its essential character'.[339] Finally Justice Williams considered that the phrase 'purposes of the Commonwealth' were included in s 81 to limit the Commonwealth's appropriating powers so that '[t]hese purposes must be found within the four corners of the *Constitution*'.[340] Unfortunately Williams J did not elaborate how these purposes might be identified.

Victoria v Commonwealth and Hayden (1975) 134 CLR 338

Later in *Victoria v Commonwealth and Hayden* (the *Australian Assistance Plan case*; see also ¶5.4.3, p 125) the High Court considered a line item appropriation in the *Appropriation Act (No 1) 1974-1975* (Cth) that provided an appropriation out of the CRF for the 'Australian Assistance Plan' according to the line items 'Grants to Regional Councils for Social Development' and 'Development and evaluation expenses'.[341] The nature of the Australian Assistance Plan and the Regional Councils was set out in guidelines and discussion papers of an interim committee of the Committee of the Social Welfare Commission[342] following a request by the Minister for assistance in 'the development of a new project' in contemplation of future legislation to implement the Australian Assistance Plan.[343] However, money was already being provided to Regional Councils out of the CRF for disbursement for the purposes outlined in the guidelines and discussion papers on the authority of the appropriation.[344] Thus, documents prepared by the interim committee of the Commission set out the purposes of the appropriation.[345] The question before the High Court was whether these were the 'purposes of the Commonwealth' required by the *Constitution* s 81.[346]

Chief Justice Barwick considered that s 81 involved a restraint on the Commonwealth's power to appropriate and expend the CRF so as to maintain the distribution of available governmental revenue agreed in the *Constitution* at the time of Federation.[347] Central to his position was the express authority in the *Constitution* s 96 to make grants to the States that has 'enabled the Commonwealth to intrude in point of policy and perhaps of administration into areas outside the Commonwealth's legislative competence'.[348] As a corollary, and the limitation on Commonwealth expenditure out of customs and excise and the distribution of the surplus revenue,[349] the Commonwealth should only intrude on the residual governmental power of the States permitted by the *Constitution* (and 'the financial federalism of the *Constitution*').[350] Thus:

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[338] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 270 (Dixon J).

[339] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 270 (Dixon J). Significantly, Dixon J accepted that '[e]ven upon the footing that the power of expenditure is limited to matters to which the Federal legislative power may be addressed, it necessarily includes whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government' (the implied nationhood power) (at 269).

[340] *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 282 (Williams J).

[341] *Appropriation Act (No 1) 1974-1975* (Cth) s 3, sch 2 (div 530, no 4). *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 344-345 (Barwick CJ), 366 (McTiernan J), 376 (Gibbs J), 398 (Mason J), 402 (Jacobs J), 416 (Murphy J).

[342] An entity established under the *Social Welfare Commission Act 1973* (Cth): see *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 345-346 (Barwick CJ), 407 (Jacobs J).

[343] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 346-352 (Barwick CJ), 376-378 (Gibbs J), 400 (Mason J), 403-405 (Jacobs J).

[344] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 352-353 (Barwick CJ), 407 (Jacobs J).

[345] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 345, 351-353 (Barwick CJ), 376 (Gibbs J), 399-401 (Mason J).

[346] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 345 and 353-354 (Barwick CJ), 366-367 (McTiernan J), 375-376 (Gibbs J), 391 (Mason J), 410 (Jacobs J), 417 (Murphy J).

[347] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 355-356 (Barwick CJ).

[348] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 357 (Barwick CJ).

[349] See *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 358 (Barwick CJ).

[350] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 357-358 (Barwick CJ).

> … a purpose must be seen in the law, either expressly or referentially by description. It must be possible to decide that the law containing the appropriation and authority to expend is valid within the constitutional limitation … however evidenced or demonstrated, the purpose of the appropriation, ie the purpose on or for which the appropriated money may be spent, must, in my opinion, both appear and satisfy the limitation present in the words of s 81, 'for the purposes of the Commonwealth'.[351]

Chief Justice Barwick then opined about 'the purposes of the Commonwealth' in s 81 saying:

> … the expression in s 51(xxxi) of the *Constitution* 'for the purpose in respect of which the Parliament has power to make laws;' is a reasonable synonym for the expression 'the purposes of the Commonwealth'.[352]

Based on this analysis Barwick CJ considered the Australian Assistance Plan was not something that the Commonwealth had power or combination of powers, to support and so the appropriation was invalid.[353]

Justice Gibbs adopted an apparently similar view that the 'purposes of the Commonwealth' were 'purposes which the Commonwealth can lawfully put into effect in the exercise of the powers and functions conferred upon it by the *Constitution*'.[354] Based on this reasoning, he considered that there was no power to legislate for the Australian Assistance Plan, and as a consequence, the appropriation for the purposes of the Plan was invalid.[355] However, he then opined:

> … it is not necessary that an Appropriation Act should set out such particulars as would establish that every purpose referred to is a Commonwealth purpose; if a purpose referred to could be a purpose of the Commonwealth – that is, if it does not appear on the face of the Act that the purpose is one with which the Commonwealth could not possibly be concerned – it should in my opinion be assumed, in the absence of proof to the contrary, that the appropriation is valid.[356]

The other justices adopted different approaches drawing distinctions between the appropriation power and a necessary expenditure power. Justice Mason followed the reasoning of Latham CJ in the *Attorney-General for Victoria v Commonwealth* saying: 'I would give the words "for the purposes of the Commonwealth" in s 81 the meaning … for such purposes as the Parliament may determine'.[357] However, Mason J then distinguished between an appropriation law with limited effect ('a *rara avis* in the world of statutes'),[358] and laws that give authority for the Commonwealth's involvement in activities in connection with the expenditure of moneys.[359] Based on this distinction, Mason J concluded the appropriation law was valid, but that the executive power necessary to expend the moneys was outside the bounds of the Commonwealth's powers.[360] The result being that the Australian Assistance Plan was invalid, albeit the appropriation for the Australian Assistance Plan was valid.[361] Like Mason J, McTiernan J also identified the reasoning of Latham CJ in the *Attorney-General for Victoria v Commonwealth* that the Commonwealth Parliament was 'entrusted with the power, duty and responsibility of determining what purpose should be Commonwealth purposes, as well as of providing for the expenditure of money for such purposes'.[362] Based on this view McTiernan J considered the appropriation was valid.[363]

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[351] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 360 (Barwick CJ).
[352] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 363 (Barwick CJ).
[353] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 364 (Barwick CJ).
[354] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 373-374 (Gibbs J).
[355] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 378 (Gibbs J).
[356] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 375 (Gibbs J).
[357] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 396 (Mason J).
[358] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 393 (Mason J).
[359] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 396 (Mason J).
[360] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 400 (Mason J).
[361] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 402 (Mason J).
[362] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 369 (McTiernan J) citing Latham CJ in *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 256. Perhaps his citing of Chief Justice Latham should be viewed with

Justice Jacobs adopted a different approach, conceiving the appropriation as 'an earmarking of the money which remains the property of the Commonwealth',[364] and that the plaintiff needed to challenge a particular expenditure rather than the appropriation – '[t]here is no analogy between the validity of legislation and the validity of expenditure'.[365] As the plaintiff had not identified a particular expenditure there was no grounds to provide the requested relief.[366] However, Jacobs J then considered the 'assumption that some part of the proposed expenditure may be beyond Commonwealth power'.[367] Justice Jacobs rejected the contention that the expenditure was beyond power: first finding that the proposal had the requisite national character reflected in the growth of a 'national character' and the expanding powers in the *Constitution*; and secondly, the incidental powers of the Commonwealth in the *Constitution*.[368]

Justice Murphy accepted the reasoning of Latham CJ in the *Attorney-General for Victoria v Commonwealth* saying: 'Parliament is the authority to determine what purposes are the purposes of the Commonwealth'.[369] Justice Murphy reasoned: nothing in the *Constitution* warranted limiting the appropriation power to the enumerated powers in the *Constitution*; express limitation was not apparent in respect of appropriations when it was in respect of other subjects implying, as a matter of interpretation, that express limitation would have been provided for appropriations if that was intended; and 'it would be quite impossible to conduct the finances of the country if the appropriation power was so limited' (a 'chilling effect').[370] The only limits on the *Constitution*'s expenditure power were considered to be free trade within the Commonwealth (s 92), religious freedom (s 116) and disability and discrimination among residents between States (s 117).[371]

Perhaps the most prescient remark was from Stephen J, concluding that there was no standing to challenge an appropriation, and perhaps echoing McTiernan J's view that appropriations are 'within the field of politics not of law':[372]

> Appropriation Acts represent one aspect of the Legislature's control over the Executive arm of government in matters financial, that concerned with the expenditure of government revenue as distinct from the raising of that revenue. The exercise of this control has long been regarded as a fundamental principle of parliamentary democracy on which is said to be grounded 'the whole law of finance, and consequently the whole British Constitution' … however the present importance of appropriation by Parliament, when the Crown and the Executive have come to represent the same forces as control a majority in the lower house, may be rather different from what it formerly was and may now lie principally in the opportunity which it affords for criticism by the Opposition and for scrutiny by the public (reference omitted).[373]

This analysis shows that these decisions of the High Court have not concluded a view about the scope of 'the purposes of the Commonwealth', there being a range of views between only those within the Commonwealth's powers according to the *Constitution*,[374] or *any* purposes determined by

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caution, as Chief Justice Latham was careful to distinguish between the legislative power of the Commonwealth to make appropriation laws, and its powers to make other laws about subject matter outside the *Constitution*'s powers relying on that subject matter being incidental to the appropriation power (see at 263 (Latham CJ)).

363 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 369-370 (McTiernan J).

364 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 411 (Jacobs J).

365 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 411-412 (Jacobs J).

366 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 412 (Jacobs J).

367 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 412 (Jacobs J)

368 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 413-414 (Jacobs J). In respect of the implied nationhood power see *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 269 (Dixon J).

369 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 417 (Murphy J).

370 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 417-418 (Murphy J).

371 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 421 (Murphy J).

372 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 370 (McTiernan J).

373 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 384 (Stephen J).

374 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 363 (Barwick CJ), 375 (Gibbs J); *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 266 (Starke J), 267 (Dixon J; with whom Rich J agreed, 264), 282 (Williams J). See

the Parliament.[375] There has also been recognition of the expanding powers of the Commonwealth under the *Constitution*, including the kinds of purposes the Commonwealth acquires through 'growth of national identity'.[376]

Combet v Commonwealth (2005) 224 CLR 494

One of the High Court's most recent exploration of the 'purposes of the Commonwealth' occurred obliquely in *Combet v Commonwealth* (see also ¶6.2.3, p 170; ¶7.6.2, p 227) showing a reluctance on the part of the majority of the High Court to intervene in determining the restricted purposes under the public administration reforms after the *Financial Management Legislation Amendment Act 1999* (Cth) and related changes.[377] In this case a union official and a Member of the House of Representatives challenged the expenditure identified in the *Appropriation Act (No 1) 2005-2006* (Cth) under the one-line appropriation as '[e]fficient and effective labour market assistance', '[h]igher productivity, higher pay workplaces' and '[i]ncreased workforce participation'.[378] The expenditure was being used to conduct an advertising campaign in anticipation of legislation to reform workplace relations.[379] While the dispute concerned the meaning of the purposes stated in the *Appropriation Act (No 1) 2005-2006* (Cth) one-line appropriation (discussed in detail below), the joint judgment adopted a construction of the provision with possible consequences for determining the 'purposes of the Commonwealth'.[380] In the view of the dissenting judgments, the joint judgment accepted an appropriation without a stated purpose (an appropriation in blank) because they accepted that an amount appropriated as a 'departmental item' was validly appropriated even though the expenditure under that item was not tied to any nominated outcome(s).[381] However, the joint judgment did address this proposition in expressly addressing the plaintiff's general proposition that 'the purpose identified in the law appropriating money must be a purpose that was notified to the Parliament and that was therefore capable of being scrutinised by the Parliament'.[382] In dealing with this proposition the joint judgment found the appropriation was for the purposes of 'departmental expenditure of one of the department of State of the Commonwealth',[383] and concluded:

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also *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 454 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ). Notably *Davis v Commonwealth* (1988) 166 CLR 79 at 95-96 (Mason CJ, Deane and Gaudron JJ) referred to 'the proposition that the validity of an appropriation act is not ordinarily susceptible to effective legal challenge'. For a further statement about the constraints on the process of appropriation see Charles Lawson, '"Special Accounts" under the *Constitution*: Amounts Appropriated for Designated Purposes' (2006) 29 *University of NSW Law Journal* 114 at 127-129.

375 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 368-369 (McTiernan J), 396 (Mason J), 410-411 (Jacobs J), 417 (Murphy J); *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 254-256 (Latham CJ), 273-274 (McTiernan J). See also *Davis v Commonwealth* (1988) 166 CLR 79 at 95-96 (Mason CJ, Deane and Gaudron JJ); Australian Constitutional Commission, *Final Report of the Constitutional Commission*, vol 2 (1988) pp 831-834.

376 *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 266 (Starke J), 269 (Dixon J); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 361-362 (Barwick CJ), 412 (Jacobs J). Notably, Justice Mason in *Victoria v Commonwealth* suggests that a narrow interpretation has potentially significant consequences: '[i]t is not lightly to be supposed that the framers of the *Constitution* intended to circumscribe the process of parliamentary appropriation by the constraints of constitutional power and thereby to expose the items in an Appropriation Act to judicial scrutiny and declarations of invalidity. Consequences more detrimental and prejudicial to the process of Parliament would be difficult to conceive. Any item in the Act would be subject to a declaration of invalidity after the Act is passed, even after the moneys in question are withdrawn from Consolidated Revenue and perhaps even after the moneys are expended, for an appropriation, if it be unlawful and subject to a declaration of invalidity, does not cease to have that character because acts have taken place on the faith of it' (at 394).

377 Relevantly, these reforms introduced accrual budgeting and outcomes and output appropriations: see Department of Finance and Administration, *Specifying Outcomes and Outputs: The Commonwealth's Accrual-based Outcomes and Outputs Framework*, Guidance for Review (1999).

378 See *Combet v Commonwealth* (2005) 224 CLR 494 at 526 (Gleeson CJ), 540 (McHugh J), 562 (Gummow, Hayne, Callinan and Heydon JJ).

379 *Combet v Commonwealth* (2005) 224 CLR 494 at 521 (Gleeson CJ), 533-535 (McHugh J), 558-559 (Gummow, Hayne, Callinan and Heydon JJ), 581-585 (Kirby J).

380 See *Combet v Commonwealth* (2005) 224 CLR 494 at 568 (Gummow, Hayne, Callinan and Heydon JJ).

381 *Combet v Commonwealth* (2005) 224 CLR 494 at 553-554 (McHugh J), 614-615 (Kirby J).

382 *Combet v Commonwealth* (2005) 224 CLR 494 at 568-569 (Gummow, Hayne, Callinan and Heydon JJ).

383 *Combet v Commonwealth* (2005) 224 CLR 494 at 568 (Gummow, Hayne, Callinan and Heydon JJ).

> It is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified [citing Latham CJ in *Attorney-General for Victoria v Commonwealth*]. It may readily be accepted that the constitutional provisions examined earlier in these reasons are to be understood as providing for what, in 1903, was said in relation to the House of Commons to be 'a comprehensive and continuous guardianship over the whole finance' of the Commonwealth. But the manner of exercising that guardianship, within the relevant constitutional limits, is to be determined by the Parliament. In that regard it is essential to recall, as Mason J pointed out in [*Australian Assistance Plan case*], that:
>
> > 'It has been the practice, born of practical necessity, in this country and in the United Kingdom, to give but a short description of the particular items dealt with in an Appropriation Act. No other course is feasible because in many respects the items of expenditure have not been thought through and elaborated in detail.'
>
> What is apparent from consideration of past practice is that at least since the mid-1980s the chief means of limiting expenditures made by departments of State that has been adopted in annual Appropriation Acts has been to specify the *amount* that may be spent rather than further define the purposes or activities for which it may be spent. There is, therefore, nothing in the relevant constitutional framework or in past parliamentary practices which suggests some construction of the *Appropriation Act (No 1) 2005-2006* [(Cth)] different from the construction required by its text (footnotes omitted).[384]

Similarly Gleeson CJ, in the majority with the joint judgment, considered that '[i]t is for the Parliament, in making appropriations, to determine what purposes are purposes of the Commonwealth'.[385] In short, Gleeson CJ and the joint judgment were placing the burden of properly elaborating the purposes of the Commonwealth squarely before the Parliament as a matter for Parliament to resolve, consistent with some of the perspectives adopted in earlier High Court judgments.[386] Notably, the 1988 Constitutional Commission also recommended 'that section 81 be amended to allow the appropriation of the [CRF] for any purpose that the Parliament thinks fit' reasoning that leaving appropriations open to review by the courts 'could bring the operations of government to a halt' and leave the courts with the difficult/impossible task of determining the purpose and the evidence to consider in assessing compliance with that purpose.[387]

Pape v Commissioner of Taxation (2009) 238 CLR 1

Most recently in *Pape v Commissioner of Taxation*, (see also ¶5.4.3, p 131; ¶5.9.2, p 155; ¶7.6.3, p 231), the High Court considered whether 'appropriated for the purposes of the Commonwealth' were a source of substantive power to enact and spend under the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth).[388] The High Court rejected this proposition,[389] concluding there needed to be *both* a valid appropriation law *and* a valid spending law to comply with the *Constitution* ss 81 and 83.[390] The different decisions, however, differed on the constitutional head of power that might be relied on for the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth). Of particular interest were the approaches to resolving questions about 'the purposes of the Commonwealth' and the arguments that might be advanced to avoid the issue in future disputes. In this matter the appropriation for the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) was a standing appropriation set out in the

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[384] *Combet v Commonwealth* (2005) 224 CLR 494 at 577 (Gummow, Hayne, Callinan and Heydon JJ) and citing *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 394 (Mason J) and *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 253 and 256 (Latham CJ).

[385] *Combet v Commonwealth* (2005) 224 CLR 494 at 522 (Gleeson CJ) citing *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 254 (Latham CJ). Notably, this was also the view favoured by Mason J in *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 396.

[386] See *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 368-369 (McTiernan J), 384 (Stephen J), 396 (Mason J), 410-411 (Jacobs J), 417 (Murphy J); *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 254-256 (Latham CJ), 273-274 (McTiernan J). See also *New South Wales v Commonwealth* (1908) 7 CLR 179 at 200 (Isaacs J).

[387] Australian Constitutional Commission, *Final Report of the Constitutional Commission*, vol 2 (1988) pp 831 and 834.

[388] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 45 (French CJ), 72 (Gummow, Crennan and Bell JJ), 99 (Hayne and Kiefel JJ), 200 (Heydon J).

[389] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55 (French CJ), 74 and 82-83 (Gummow, Crennan and Bell JJ), 113 (Hayne and Kiefel JJ), 210-213 (Heydon J).

[390] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 45 and 55-56 (French CJ), 75 and 82-83 (Gummow, Crennan and Bell JJ), 105-106 (Hayne and Kiefel JJ), 215 (Heydon J). See also Andrew McLeod, 'The Executive and Financial Powers of the Commonwealth: Pape v Commissioner of Taxation' (2010) 32 *Sydney Law Review* 123 at 126-131.

Taxation Administration Act 1953 (Cth) for any amounts payable under a 'taxation law'.[391] The *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) was such a 'taxation law'.[392] The purposes of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) were broadly stated as providing an economic stimulus in response to a global economic crisis.[393] The plaintiff submitted, in part, that the appropriation was invalid because it was beyond 'a purpose for which the Parliament has power to make laws'[394] because the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) itself was beyond power.[395] The High Court concluded that 'the purposes of the Commonwealth' were those within the Commonwealth's powers according to the *Constitution*:[396] Chief Justice French – '[t]he "purposes of the Commonwealth" are the purposes otherwise authorised by the *Constitution* or by statutes made under the *Constitution*';[397] Justices Gummow, Crennan and Bell – 'there is an appropriation of the Consolidated Revenue Fund within the meaning of the *Constitution*';[398] Justices Hayne and Kiefel – '[*Taxation Administration Act 1953* (Cth)] responds to the valid operation of the [*Tax Bonus for Working Australians Act (No 2) 2009* (Cth)] and appropriates the Consolidated Revenue Fund to the necessary extent';[399] Justice Heydon – '[t]he power of appropriation is limited by s 83 [a law]'.[400]

Chief Justice French accepted that there was a valid appropriation in the *Taxation Administration Act 1953* (Cth) as a 'proposition'.[401] After reviewing the earlier High Court decisions,[402] Chief Justice French concluded that '[t]he "purposes of the Commonwealth" are the purposes otherwise authorised by the *Constitution* or by statutes made under the *Constitution*'.[403] He then concluded that the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) was validly authorised by the Executive and incidental powers: '[t]he requisite power in this case is to be found in s 61 read with s 51(xxxix)'.[404] Chief Justice French recites, however, the propositions of the 1929 Royal Commission on the Constitution and the 1988 Constitutional Commission that a broad view of 'the purposes of the Commonwealth' should be favoured because many appropriations are made 'for purposes having little or no apparent connection with the powers or functions of the Commonwealth'[405] and 'the Federal Parliament has upon a number of occasions, and over a long period of time, exceeded its powers'.[406] Chief Justice French also notes that the 1988 Constitutional Commission 'recommended amendment to dispel uncertainty' and that this recommendation as a

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391 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 32 (French CJ), 71 (Gummow, Crennan and Bell JJ), 96-97 (Hayne and Kiefel JJ), 134 and 215 (Heydon J).

392 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 32 (French CJ), 71 (Gummow, Crennan and Bell JJ), 97 (Hayne and Kiefel JJ), 134 (Heydon J).

393 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 32 (French CJ), 66-67 (Gummow, Crennan and Bell JJ), 95 (Hayne and Kiefel JJ).

394 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 71 (Gummow, Crennan and Bell JJ).

395 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 25 (French CJ), 71 (Gummow, Crennan and Bell JJ), 98 (Hayne and Kiefel JJ), 134 (Heydon J).

396 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55-56 (French CJ), 70 (Gummow, Crennan and Bell JJ), 133 (Hayne and Kiefel JJ), 213 (Heydon J). For a similar perspective see also *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 363 (Barwick CJ), 375 (Gibbs J); *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 266 (Starke J), 267 (Dixon J; with whom Rich J agreed, 264), 282 (Williams J). See also *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 454 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

397 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 56 (French CJ).

398 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 70 (Gummow, Crennan and Bell JJ).

399 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 133 (Hayne and Kiefel JJ).

400 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 23 and 213 (Heydon J).

401 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 23 and 64 (French CJ).

402 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 45-55 (French CJ).

403 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 56 (French CJ).

404 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55 (French CJ).

405 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 54 (French CJ) citing Australian Constitutional Commission, *Final Report of the Constitutional Commission*, vol 2 (1988) p 834.

406 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 54-55 (French CJ) citing Royal Commission on the Constitution, *Report of the Royal Commission on the Constitution* (1929), Minutes of Evidence, Pt 3, p 780.

constitutional amendment has never been subjected to referendum.[407] It perhaps appears Chief Justice French reached his decision on the basis the appropriation was within the existing authority of the *Constitution*, meanwhile favouring a broader conception of the 'purposes of the Commonwealth'.

Justices Gummow, Crennan and Bell considered that the inter-mural nature of the disputed appropriation was sufficient to determine the appropriation was valid:

> Section 53 has been said in this Court to be a procedural provision governing the intra-mural activities of the Parliament and not giving rise to invalidity of legislation which has passed both legislative chambers and received the Royal Assent.[408]

As *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) with a standing appropriation in *Taxation Administration Act 1953* (Cth) conformed with the House of Representatives practice of being 'treat[ed] as a special appropriation bill',[409] and was treated accordingly,[410] then 'there is an appropriation of the Consolidated Revenue Fund within the meaning of the *Constitution* in respect of payments by the Commissioner required by [the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth)]'.[411]

Justices Hayne and Kiefel's decision responded to the Commonwealth's contention that 'Parliament has power to appropriate the Consolidated Revenue Fund for any purpose it thinks fit'.[412] Before detailing the controversies about the ambit of 'the purposes of the Commonwealth',[413] Justices Hayne and Kiefel concluded:

> … it will ultimately be unnecessary to attempt some definitive exposition of the meaning of this phrase beyond saying that there is evident force in the view that it is not limited to purposes in respect of which the Parliament has express power to make laws. Not least is that so when it is recognised that there may be an appropriation for a valid exercise of the executive power of the Commonwealth and that, at least to the extent of matters going to the very survival of the polity and a class of matters like national symbols and celebrations, the executive power of the Commonwealth is not bounded by the express grants of legislative power. But it is neither necessary nor possible to attempt to chart the boundaries of the area encompassed by the phrase 'for the purposes of the Commonwealth' when it is used in s 81. And in particular, it is not necessary to decide whether the phrase encompasses *any* purpose determined by the Parliament to be a purpose of the Commonwealth (footnotes omitted).[414]

Justices Hayne and Kiefel surveyed of the controversy about the meaning of 'the purposes of the Commonwealth' and conclude that any meaning would not be determinative anyway:[415]

> … asking whether a particular appropriation can be described as being for a purpose of the Commonwealth will seldom if ever yield an answer determinative of constitutional litigation in this Court. There are at least two reasons why that is so. First, the generality with which appropriations are ordinarily expressed will not readily permit examination of whether the purposes thus identified are purposes of the Commonwealth. Secondly, if there is a plaintiff (other than a State Attorney-General) who has standing to challenge a particular expenditure, the question at issue will be about a particular application of money to a particular purpose. That is an inquiry that will turn upon the ambit of the power (legislative or executive) that is said to be engaged if the expenditure is made.[416]

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[407] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55 (French CJ).
[408] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 70 (Gummow, Crennan and Bell JJ) citing *Permanent Trustee Australia Ltd v Commissioner of State Revenue)* (2004) 220 CLR 388 at 409 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
[409] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 70 (Gummow, Crennan and Bell JJ).
[410] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 70-71 (Gummow, Crennan and Bell JJ).
[411] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 70 (Gummow, Crennan and Bell JJ).
[412] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 102 (Hayne and Kiefel JJ).
[413] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 106-112 (Hayne and Kiefel JJ).
[414] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 103 (Hayne and Kiefel JJ).
[415] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 106-112 (Hayne and Kiefel JJ).
[416] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 112 (Hayne and Kiefel JJ).

Adopting this proposition Justices Hayne and Kiefel focussed on the substantive power to support the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth).[417] They rejected various heads of power and eventually decided that the taxation power was relevant,[418] albeit the taxation power had to be read down in this matter so that the amount of the bonus related to the amount of tax actually paid.[419] So, reading the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) as a repayment of tax paid up to the lesser of the tax bonus or the tax actually paid the Act was valid exercise of the *Constitution* s 51(ii) taxation power.[420] The result was to find that the standing appropriation was valid because it 'responds to the valid operation of the [*Tax Bonus for Working Australians Act (No 2) 2009* (Cth)] and appropriates the Consolidated Revenue Fund to the necessary extent'.[421] As a consequence the appropriation was within the bounds of the 'purposes of the Commonwealth' because the appropriation in the *Taxation Administration Act 1953* (Cth) 'respond[ed]' to the validly enacted *Tax Bonus for Working Australians Act (No 2) 2009* (Cth).

For Justice Heydon 'the purposes of the Commonwealth' were confined by the requirement that there be 'a law' as required by s 83 and that this was restricted to 'the purposes of the Commonwealth' being 'what can be done by the enactment of a valid law'.[422] Justice Heydon framed the dispute as to whether there was a valid head of power for the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) having 'assumed' that the *Taxation Administration Act 1953* (Cth) was a standing appropriation to authorise the payments.[423] Examining each of the possible heads of power and rejecting each,[424] Justice Heydon found each to be 'erroneous'.[425] Of particular significance was Justice Heydon's response to the defendant's submissions that the only limits to a s 81 appropriation power was first 'the purposes of the Commonwealth as a nation as determined by the Parliament itself acting under
s 81' or secondly, 'the expression extends to such purposes in the sense of goals or objectives as the Commonwealth as a polity in fact has and pursues from time to time in the exercise of its legislative and executive powers':[426]

> … the construction of the words 'for the purposes of the Commonwealth' in s 81. Those words do not have the wide meaning urged by the defendants. Section 81 does not give the Commonwealth a power to make appropriations for the general welfare. That is because if it did, it would, taken with the executive power to spend (which for the purposes of considering the present argument is assumed to be conferred by the appropriation) and a power to legislate under s 51(xxxix) as an incident to it, make the Commonwealth a government of general and unlimited legislative powers, despite the enumeration in other sections of the Constitution of specific powers … the narrower construction must be preferred. In *Attorney-General (Vic) v Commonwealth* Dixon J said that to read s 81 as giving the Commonwealth a power to enact laws for the general welfare 'would be to amend the *Constitution*, not to interpret it'. The power of appropriation is limited by s 83 (footnote omitted).[427]

While in dissent, Justice Heydon's decision supported the proposition that 'the purposes of the Commonwealth' is limited to laws validly enacted with the authority of the *Constitution*.

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[417] See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 112-133 (Hayne and Kiefel JJ).
[418] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 112-114 (appropriation power), 114-124 (executive power), 124-126 (nationhood power), 126-128 (external affairs), 128 (trade and commerce with other countries and among the States), 129-133 (taxation) (Hayne and Kiefel JJ).
[419] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 133 (Hayne and Kiefel JJ).
[420] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 133 (Hayne and Kiefel JJ).
[421] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 133 (Hayne and Kiefel JJ).
[422] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 214 (Heydon J).
[423] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 134 (Heydon J).
[424] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 150-153 (trade and commerce with other countries and among the States), 154-157 (taxation), 157-168 (external affairs), 168-177 (nationhood power), 177-199 (executive power), 200-215 (appropriation power) (Heydon J).
[425] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 134 (Heydon J).
[426] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 200 (Heydon J).
[427] *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 213 (Heydon J).

7.6.2 How precisely must those purposes be specified?

There seems little doubt that 'one-line appropriations' are valid.[428] The question remains, however, how precisely do the purposes need to be specified? The decisions of the High Court established that 'there cannot be appropriations in blank, appropriations for no designated purpose'[429] and that every effort should be made to find an appropriation law valid.[430] The articulation of the purposes might be brief, but so long as the purposes are articulated, the requirements of the *Constitution* are satisfied: 'a purpose must be seen in the law, either expressly or referentially by description'.[431] Significantly, the High Court has accepted that so long as *some* Commonwealth purpose is disclosed by the construction of the appropriation 'for which the moneys appropriated might be expended', then it will be valid.[432] A further requirement may be that the appropriation 'must nominate an amount of money to be appropriated or specify a formula or criterion by which the amount appropriated can be determined'.[433] Exactly how broadly the purpose might be stated, however, remains unclear, albeit that the High Court adopts an approach of interpreting the appropriation and seeking its 'true construction'.[434] The following decisions illustrate this approach.

Brown v West (1990) 169 CLR 195

In *Brown v West* (see also ¶6.2.3, p 169) an opposition member of the House of Representatives challenged the Minister of State for Administrative Services (the Minister) and other members of the Government over the Minister's decision to increase the postage entitlement of Senators and Members of the House of Representatives under the *Parliamentary Allowances Act 1952* (Cth).[435] Under existing arrangements a postal allowance was determined by the Remuneration Tribunal according to the *Remuneration Tribunal Act 1973* (Cth) with an appropriation of the CRF for the determined amounts set out in the *Remuneration Tribunal Act 1973* (Cth).[436] The Minister later decided to increase the postal allowance and include an indexation arrangement and dispense the increased amount according to the terms of the existing *Remuneration Tribunal Act 1973* (Cth) determination.[437] The Minister then relied on the *Supply Act (No 1) 1989-1990* (Cth)[438] as the appropriation of the CRF

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428 See *Combet v Commonwealth* (2005) 224 CLR 494 at 522 (Gleeson CJ); *Brown v West* (1990) 169 CLR 195 at 209 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 360 (Barwick CJ), 369 (McTiernan J), 375-376 (Gibbs J), 394 (Mason J), 404 (Jacobs J), 421 (Murphy J).

429 *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 253 (Latham CJ). See also *New South Wales v Commonwealth* (1908) 7 CLR 179 at 200 (Isaacs J); *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 224 (Isaacs and Rich JJ); *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 600 (McHugh J).

430 See, for example, *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 267 (Dixon J; with whom Rich J agreed, at 264). See also *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 375 (Gibbs J).

431 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 360 (Barwick CJ). See also 375 (Gibbs J), 394 (Mason J), 404 (Jacobs J), 422 (Murphy J); *Combet v Commonwealth* (2005) 224 CLR 494 at 522 (Gleeson CJ), 554 (McHugh J), 577 (Gummow, Hayne, Callinan and Heydon JJ), 597 (Kirby J); *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 253 (Latham CJ); *New South Wales v Commonwealth* (1908) 7 CLR 179 at 192 (Barton J), 200 (Isaacs J).

432 *Brown v West* (1990) 169 CLR 195 at 208 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *Combet v Commonwealth* (2005) 224 CLR 494 at 522 (Gleeson CJ), 553-554 (McHugh J), 577 (Gummow, Hayne, Callinan and Heydon JJ), 614-615 (Kirby J); *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 576-577 (Mason CJ, Deane, Toohey and Gaudron JJ), 582 (Brennan J), 593 (Dawson J), 600 (McHugh J); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 404 (Jacobs J).

433 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 600 (McHugh J) citing in contrast the decision in *Fisher v R* (1901) 26 VLR 781 at 800.

434 *Brown v West* (1990) 169 CLR 195 at 212 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

435 *Brown v West* (1990) 169 CLR 195 at 199 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

436 *Brown v West* (1990) 169 CLR 195 at 199-200 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

437 *Brown v West* (1990) 169 CLR 195 at 199-200 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

438 The Supply Acts was an Act appropriating the CRF for use in the financial year pending the passing of Appropriation Acts, whereupon they ceased to have effect, so the *Supply Act (No 1) 1989-1990* (Cth) provisions were repeated in the *Appropriation Act (No 1) 1989-1990* (Cth) and the *Supply Act (No 1) 1989-1990* (Cth) then ceased to have effect: see *New South Wales v Bardolph* (1934) 52 CLR 455, 479 (Evatt J); *Brown v West* (1990) 169 CLR 195 at 206-207, 209-210 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). From 1994 with the change to a financial year the Supply Acts ceased to be necessary: see Commonwealth, *The Commonwealth Budget: Process and Presentation*, Parliamentary Library Research Paper No 6 (2003).

for the additional expenditure.[439] The expressed purpose in the *Supply Act (No 1) 1989-1990* (Cth) for which the money might be expended that were relied on by the Minister were in very broad terms: 'Parliamentary and Ministerial Staff and Services … Running Costs … Other Services' and 'Advance to the Minister for Finance'.[440] The question for the High Court was whether these purposes included a postal allowance.[441]

The High Court in a unanimous decision considered the scope of executive power to alter determinations made under the *Remuneration Tribunal Act 1973* (Cth)[442] and the likely roles of the *Supply Act (No 1) 1989-1990* (Cth) provisions.[443] The High Court concluded that there was no executive power for the Minister to override the Remuneration Tribunal determination and so rely on the appropriation in the *Remuneration Tribunal Act 1973* (Cth).[444] The High Court also concluded that the *Supply Act (No 1) 1989-1990* (Cth) was not intended to include any appropriations for any new policy such as an increased postal allowance determined by the Minister,[445] and that there was no intention expressed in that Act to override the *Remuneration Tribunal Act 1973* (Cth).[446] The result was therefore that neither the *Remuneration Tribunal Act 1973* (Cth) appropriation nor the *Supply Act (No 1) 1989-1990* (Cth) appropriations were valid to support the increased postal allowance.[447] However, the significance of the decision was that the High Court did not found its decision on the scope of the disclosed 'purposes' of the appropriations, and did not specifically reject or adversely comment on the broadly stated purposes set out in the *Supply Act (No 1) 1989-1990* (Cth). These broadly stated purposes included an 'Advance to the Minister for Finance' for various advances and unspecified payments for which no other appropriation existed, and 'Parliamentary and Ministerial Staff and Services' described as 'Running Costs' and 'Other Services'.[448] In short, the High Court accepted that an appropriation 'must designate the purpose or purposes for which the moneys appropriated might be expended'[449] and appeared to accept very broadly stated purposes, and in the case of the 'Advance to the Minister for Finance', an amount for *any* purpose.

Combet v Commonwealth (2005) 224 CLR 494

The subsequent decision of the High Court in *Combet v Commonwealth* (also interpreting the scope of a 'one-line appropriation')[450] (see also ¶6.2.3, p 170; ¶7.6.1, p 221) did not challenge the approach in *Brown v West*, albeit the context of appropriations in the cases were significantly different. That is, *Combet v Commonwealth* considered an appropriation following the adoption of accrual budgeting arrangements and a change in the focus of appropriations from inputs to outcomes/outputs/programs following the *Financial Management Legislation Amendment Act 1999* (Cth).[451] As Gleeson CJ stated:

> A recent development in the theory and practice of public administration is the trend towards 'outcome appropriations' as a means of stating the purposes for which governments spend public money … Typically,

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439 *Brown v West* (1990) 169 CLR 195 at 200 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
440 *Brown v West* (1990) 169 CLR 195 at 200 and 209-210 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
441 *Brown v West* (1990) 169 CLR 195 at 209 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
442 *Brown v West* (1990) 169 CLR 195 at 201-205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
443 *Brown v West* (1990) 169 CLR 195 at 205-212 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
444 *Brown v West* (1990) 169 CLR 195 at 201-205 and 212 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
445 This conclusion was reached after considering the *Constitution* ss 53, 54 distinction between appropriations for the 'ordinary annual services of the Government' and other appropriations, and the Parliamentary of separating the classes of appropriations according to different Supply Act: *Brown v West* (1990) 169 CLR 195 at 205-207 and 211 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
446 *Brown v West* (1990) 169 CLR 195 at 205-207 and 211-212 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
447 *Brown v West* (1990) 169 CLR 195 at 212 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
448 See *Brown v West* (1990) 169 CLR 195 at 209-211 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
449 *Brown v West* (1990) 169 CLR 195 at 208 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
450 See *Combet v Commonwealth* (2005) 224 CLR 494 at 526 (Gleeson CJ), 540 (McHugh J), 562 (Gummow, Hayne, Callinan and Heydon JJ).
451 For an overview of these developments see Department of Finance and Administration, *Specifying Outcomes and Outputs: The Commonwealth's Accrual-based Outcomes and Outputs Framework*, Guidance for Review (1999).

> outcomes are stated at a high level of generality … While the generality of statements of outcome may increase the difficulty of contesting the relationship between an appropriation and a drawing, appropriations are made in a context that includes public scrutiny and political debate concerning budget estimates and expenditure review. The higher the level of abstraction, or the greater the scope for political interpretation, involved in a proposed outcome appropriation, the greater may be the detail required by Parliament before appropriating a sum to such a purpose; and the greater may be the scrutiny involved in review of such expenditure after it has occurred. Specificity of appropriation is not the only form of practical control over government expenditure. The political dynamics of estimation and review form part of the setting in which appropriations are sought, and made.[452]

The question agreed by the parties for the High Court's consideration was whether the expenditure on advertising was authorised by the one-line outcome appropriations '[e]fficient and effective labour market assistance', '[h]igher productivity, higher pay workplaces' and '[i]ncreased workforce participation'.[453] The majority comprising Gleeson CJ and the joint judgment (Gummow, Hayne, Callinan and Heydon JJ) rejected the challenge.[454] The joint reasons adopt a construction of the *Appropriation Act (No 1) 2005-2006* (Cth) that avoided having to determine whether the expenditure was within the purposes of the outcome appropriation formulated by the agreed question, by finding that the plaintiffs had not addressed that relevant contentious issue:

> Contrary to the plaintiffs' case, the question for decision is not whether the advertising expenditure answers one or more of the stipulated outcomes but whether it is applied for departmental expenditure … Satisfaction of that criterion is not challenged by the plaintiffs.[455]

The joint judgment interpreted the *Appropriation Act (No 1) 2005-2006* (Cth) so that:

> … the several amounts of Departmental Outputs which are identified against particular outcomes, and together make up the departmental item, are not tied to expenditure for the purpose of achieving any of the nominated outcomes. The only relevant requirement imposed by the Act is that the departmental item be applied only 'for the departmental expenditure of the entity'.[456]

As the plaintiffs did not make any submissions addressing whether the advertising expenditure was outside the meaning of 'departmental expenditure' the joint judgment did not address the issue, albeit they considered that there was an appropriation for the Act's purpose that 'included the purpose of appropriating a sum of money for the departmental expenditure of one of the departments of State of the Commonwealth'.[457] The joint judgment and Gleeson CJ both essentially accepted that it was for Parliament to determine the specificity of purpose set out in the appropriation.[458] The joint judgment stated:

> What is apparent from consideration of past practice is that at least since the mid-1980s the chief means of limiting expenditures made by departments of State that has been adopted in annual appropriation Acts has been to specify the *amount* that may be spent rather than further define the purposes or activities for which it may be spent. There is, therefore, nothing in the relevant constitutional framework or in past parliamentary practices which suggests

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[452] *Combet v Commonwealth* (2005) 224 CLR 494 at 523 (Gleeson CJ).

[453] *Combet v Commonwealth* (2005) 224 CLR 494 at 526 (Gleeson CJ), 531 and 540 (McHugh J), 560 and 562 (Gummow, Hayne, Callinan and Heydon JJ), 579-580 (Kirby J).

[454] *Combet v Commonwealth* (2005) 224 CLR 494 at 531 (Gleeson CJ), 531 (McHugh J), 579 (Gummow, Hayne, Callinan and Heydon JJ).

[455] *Combet v Commonwealth* (2005) 224 CLR 494 at 568 (Gummow, Hayne, Callinan and Heydon JJ).

[456] *Combet v Commonwealth* (2005) 224 CLR 494 at 566 (Gummow, Hayne, Callinan and Heydon JJ).

[457] See *Combet v Commonwealth* (2005) 224 CLR 494 at 568 (Gummow, Hayne, Callinan and Heydon JJ).

[458] *Combet v Commonwealth* (2005) 224 CLR 494 at 529-530 (Gleeson CJ; '[p]rovided such statements are not so general, or abstract, as to be without meaning, they represent Parliament's lawful choice as to the manner in which it identifies the purpose of an appropriation … If Parliament formulates the purposes of appropriation in broad, general terms, then those terms must be applied with the breadth and generality they bear'), 577 (Gummow, Hayne, Callinan and Heydon JJ; '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified … the manner of exercising that guardianship, within the relevant constitutional limits, is to be determined by the Parliament').

> some construction of the *Appropriation Act (No 1) 2005-2006* different from the construction required by its text (emphasis in original).[459]

Meanwhile, Gleeson CJ relied on different reasoning based on his construction of the text of the Appropriation Act within the context of the '*Constitution*, parliamentary practice, accounting standards, and principles and methods of public administration'[460] and stated:

> The matter of parliamentary appropriation goes to the essence of relations between the Parliament and the Executive, and of relations between the Senate and the House of Representatives. Parliamentary practice comprehends procedures relating to budget estimates, audit, expenditure review, and performance assessment. Such procedures operate in a dynamic, political environment. In public administration, theory and practice change and develop. The *Constitution* was designed to allow for a necessary degree of flexibility in administrative arrangements.[461]

The significance of both *Brown v West* and *Combet v Commonwealth* was that the High Court majorities crafted decisions that avoided having to determine the scope of the purposes of the appropriations, and as a consequence, adjudicating the content and form of the appropriation laws passed by the Parliament. This undoubtedly recognises the broader political context in which appropriations are made and places the responsibility on the Parliament to properly balance the *before* the expenditure appropriation laws with the necessary *after* the expenditure scrutiny. Unfortunately the High Court in *Combet v Commonwealth* did not address the practice at that time (and remaining the practice) of providing for appropriations in the form of the 'Advance to the Finance Minister' and Net Appropriation Agreements.[462] This is significant because the 'Advance to the Finance Minister' sets out a maximum amount but does not clearly provide for the purposes of the appropriation, while the Net Appropriation Agreements sets out a purpose but does not clearly specify the amount of the appropriation.

First, the 'Advance to the Finance Minister' provides up to an amount that may be expended 'if the Finance Minister is satisfied that there is an urgent need for expenditure, in the current year, that is not provided for, or is insufficiently provided for' either 'because of an erroneous omission or understatement' or 'because the expenditure was unforeseen'.[463] Significantly, these determinations by the Finance Minister are not disallowable instruments for the purposes of the *Legislative Instruments Act 2003* (Cth) limiting the opportunity for Parliament to prevent the anticipated expenditure.[464] This appears on its face to be an appropriation for potentially any purposes that is confined only by the maximum amount that might be expended. While not expressly approved in *Combet v Commonwealth* such as approach would appear consistent with the joint judgment's views that specifying an *amount* alone might have been considered adequate.[465] Unfortunately *Brown v West* did not address this issue even though the defence had pleaded that the increased postal allowance was authorised by the 'Advance to the Finance Minister'.[466] There, the High Court reasoned that the

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[459] *Combet v Commonwealth* (2005) 224 CLR 494 at 577 (Gummow, Hayne, Callinan and Heydon JJ).

[460] *Combet v Commonwealth* (2005) 224 CLR 494 at 523 (Gleeson CJ).

[461] *Combet v Commonwealth* (2005) 224 CLR 494 at 523 (Gleeson CJ) citing *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 401-403 (Gleeson CJ).

[462] These forms of appropriation were present in *Appropriation Act (No 1) 2005-2006* (Cth) s 10 (net appropriations) and 12 (Advance to the Finance Minister).

[463] *Appropriation Act (No 1) 2008-2009* (Cth) s 14(1); *Appropriation Act (No 2) 2008-2009* (Cth) s 15(1). See also Explanatory Memorandum, Appropriation Bill (No 1) 2008-2009 (Cth) pp 15-16; Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 33-35; Minister for Finance and Administration, *Issues from the Advance to the Finance Minister* (2006) and the same titles from previous years; Standing Committee on Finance and Government Operations, Senate, *Advance to the Minister for Finance* (1979).

[464] See *Appropriation Act (No 1) 2008-2009* (Cth) s 14(4); *Appropriation Act (No 2) 2008-2009* (Cth) s 15(4). Notably, the Senate does consider these appropriations, but with *only* an opportunity to express dissatisfaction: Harry Evans, *Odgers' Australian Senate Practice* (11th ed, 2004) p 273.

[465] *Combet v Commonwealth* (2005) 224 CLR 494 at 577 (Gummow, Hayne, Callinan and Heydon JJ).

[466] *Brown v West* (1990) 169 CLR 195 at 200 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

increased expenditure could not have been intended to be included in the *Supply Act (No 1) 1989-1990* (Cth) because it was not an appropriation for new policies.[467] That decision might have been different, however, if the defence had pleaded the appropriation was addressed by the 'Advance to the Finance Minister' in the *Supply Act (No 2) 1989-1990* (Cth) that could include *new* policies including 'to make money available for expenditure … that the Minister for Finance is satisfied is expenditure that is urgently required' that was 'unforeseen' or 'particulars of which will afterwards be submitted to the Parliament'.[468] In those circumstances an increased postal allowance might readily have been made (and the expenditure incurred) and then notified to the Parliament.

Secondly, Net Appropriation Agreements are an appropriation determined by the Finance Minister under the *Financial Management and Accountability Act 1997* (Cth) from amounts received from non-appropriation sources and added to an existing appropriation authorised by an annual Appropriation Act.[469] The amounts received from the non-appropriation sources and then credited to the annual Appropriation Act appropriation are not certain at the time of the annual Appropriation Act is made, and they are quantified for the purposes of that appropriation at the discretion of the Finance Minister.[470] Significantly, these Net Appropriation Agreements are not disallowable instruments for the purposes of the *Legislative Instruments Act 2003* (Cth) limiting the opportunity for Parliament to prevent (or modify) the anticipated expenditure.[471]

7.6.3 A spending power?

An argument that s 81 included a 'spending power' originated from confusion at the Constitutional Convention debates.[472] Then in the High Court decisions, including in *Attorney-General for Victoria v Commonwealth*,[473] *Australian Woollen Mills Pty Ltd v Commonwealth*,[474] *Victoria v Commonwealth*,[475] and *Northern Suburbs General Cemetery Reserve Trust v Commonwealth*,[476] left open the possibility that there was such a power.[477] The zenith of this argument was probably Chief Justice Latham's decision in *Attorney-General for Victoria v Commonwealth*:

> … the provisions of s 81 can fairly be read as intended to mean that it is the Commonwealth Parliament, and not any court, which is entrusted with the power, duty and responsibility of determining what purposes shall be Commonwealth purposes, as well as of providing for the expenditure of money for such purposes.[478]

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467 *Brown v West* (1990) 169 CLR 195 at 211 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

468 *Supply Act (No 2) 1989-1990* (Cth) s 3 (sch 2, div 868).

469 See *Appropriation Act (No 1) 2008-2009* (Cth) s 13; *Financial Management and Accountability Act 1997* (Cth) s 31. See also Explanatory Memorandum, Appropriation Bill (No 1) 2008-2009 (Cth) pp 14-15; Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 22-27; Australian National Audit Office, *Management of Net Appropriation Agreements*, Audit Report No 28 2005-06 (2005).

470 See *Appropriation Act (No 1) 2008-2009* (Cth) s 14(2).

471 See *Legislative Instruments Act 2003* (Cth) s 44(2) (item 38); *Appropriation Act (No 1) 2008-2009* (Cth) s 14(4).

472 See Cheryl Saunders, 'The Development of the Commonwealth Spending Power' (1978) 11 *Melbourne University Law Review* 369 at 375-379. See also Gabrielle Appleby, 'There Must be Limits: The Commonwealth Spending Power' (2009) 37 *Federal Law Review* 93.

473 *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 250 and 253-254 (Latham CJ), 265-266 (Starke J), 269 (Dixon J), 273 (McTiernan J), 281 (Williams J).

474 *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 454 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

475 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 354 (Barwick CJ), 367 (McTiernan J), 371 (Gibbs J), 392 (Mason J), 410 (Jacobs J), 418 (Murphy J).

476 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 572 (Mason CJ, Deane, Toohey and Gaudron JJ), 579 and 581-582 (Brennan J), 593 (Dawson J), 601 (McHugh J).

477 See also *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 24, 45-55 (French CJ), 73-74 (Gummow, Crennan and Bell JJ), 112-114 (Hayne and Kiefel JJ), 201-203 (Heydon J). See also Enid Campbell, 'The Federal Spending Power' (1969) 8 *University of Western Australia Law Review* 443.

478 *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 256 (Latham CJ). Notably, however, Chief Justice Latham then stated: 'This conclusion, however, relates only to laws providing for the expenditure of money. It does not follow that the Commonwealth Parliament, because it can, as it were, subscribe towards the support of what it considers to be worthy objects, can take legislative control of matters relating to any such objects in respect of which there is no other grant of legislative power … The power to appropriate and expend money, however wide that power may be, does

Pape v Commissioner of Taxation (2009) 238 CLR 1

This proposition has now been comprehensively rejected by the High Court in *Pape v Commissioner of Taxation*[479] (see also ¶5.4.3, p 131; ¶5.9.2, p 155; ¶7.6.1, p 222). In that case a taxpayer challenged the validity of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) that appropriated one-off payments to 8.7 million taxpayers as part of a 'fiscal stimulus' responding to the 'global financial crisis'.[480] The taxpayer asserted that he was entitled to receive a payment under the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) but that this payment was not supported by a valid constitutional head of power and that it failed to comply with the requirements of an appropriation for Commonwealth purposes as required by the *Constitution* ss 81 and 83.[481] In response to the taxpayer's challenge the Commonwealth again contended[482] that the appropriation was supported by a 'spending power' in the *Constitution* ss 81 and 51(xxxix).[483] While the High Court expressly rejected this contention,[484] the High Court majority of Chief Justice French and Justices Gummow, Hayne, Crennan, Kiefel and Bell concluded that the spending must be authorised by other provisions in the *Constitution*[485] albeit the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) spending was authorised by different provisions in the *Constitution*.[486] For Chief Justice French the constitutional authority for the spending authorisation validly enacted in the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) was 'to be found in s 61 read with s 51(xxxix)':[487]

> In my opinion, the history, the text and the logic underlying the operation of ss 81 and 83 are inconsistent with their characterisation as the source of a 'spending' or 'appropriations' power, notwithstanding their description as such in some of the judgments of Justices of this Court. There is no clear indication in the judgments of a majority consensus in support of a contrary view. The clearest statement of the character of ss 81 and 83 in this regard, with which I respectfully agree, is that of McHugh J in [*Northern Suburbs General Cemetery Reserve Trust v Commonwealth*].[488] Neither provision confers power. Section 81 directs all revenues or moneys made by the Executive Government into the Consolidated Revenue Fund. Such moneys are only to be appropriated from that Fund for 'the purposes of the Commonwealth'. By virtue of s 83 no money can be drawn from the Fund absent such an appropriation by law, that is to say by statute. Substantive power to spend the public moneys of the Commonwealth is not to be found in s 81 or s 83, but elsewhere in the *Constitution* or statutes made under it. That substantive power may be conferred by the exercise of the legislative powers of the Commonwealth. It may also be an element or incident of the executive

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not enable the Commonwealth to extend its legislative powers beyond those marked out and defined by the *Constitution*, although (in my opinion) those powers include a general appropriation power' (at 256-257). He ultimately decided that the *Pharmaceutical Benefits Act 1944* (Cth) was not authorised under the *Constitution* ss 51 (xxxix) and 81 because it was 'far more than an appropriation Act' (at 263).

479 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55 (French CJ), 74 and 82-83 (Gummow, Crennan and Bell JJ), 113 (Hayne and Kiefel JJ), 210-213 (Heydon J).

480 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 22-23 (French CJ), 67 (Gummow, Crennan and Bell JJ), 95 and 98 (Hayne and Kiefel JJ), 138-139 (Heydon J).

481 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 34-36 (French CJ).

482 Earlier decisions had addressed the possibility of a 'spending power' raised by the Commonwealth: see, for examples, *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 354 (Barwick CJ), 367 (McTiernan J), 371-372 (Gibbs J), 392 (Mason J), 410-411 (Jacobs J), 418 (Murphy J); *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 253-256 (Latham CJ), 264 (Rich J), 265-266 (Starke J), 269 (Dixon J), 273 (McTiernan J), 280-281 (Williams J).

483 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 33 (French CJ), 73-74 (Gummow, Crennan and Bell JJ), 99 (Hayne and Kiefel JJ), 200 (Heydon J).

484 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55 (French CJ), 74 and 82-83 (Gummow, Crennan and Bell JJ), 113 (Hayne and Kiefel JJ), 210-213 (Heydon J).

485 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55 and 60 (French CJ), 89 (Gummow, Crennan and Bell JJ), 113 (Hayne and Kiefel JJ), 211 (Heydon J).

486 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55 (French CJ), 87-88 (Gummow, Crennan and Bell JJ), 133 (Hayne and Kiefel JJ).

487 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55 (French CJ).

488 Being: 'Neither s 81 nor s 83 of the *Constitution* gives any express power to appropriate money for Commonwealth purposes. However, the power to appropriate is a necessary incident of the power to make laws with respect to a subject matter and is implied by the grant of that power': *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 601 (McHugh J).

> power of the Commonwealth derived from s 61, subject to the appropriation requirement and supportable by legislation made under the incidental power in s 51(xxxix) (footnotes omitted).[489]

Similarly, for Justices Gummow, Crennan and Bell the spending was authorised by the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) that was itself validly enacted with the authority of s 61 read with s 51(xxxix).[490] Importantly:

> Once the nature of the process of parliamentary appropriation is appreciated, the sections of the *Constitution* which provide for it [ss 81 and 83] do not serve as sources of a 'spending power' by the width of which is determined the validity of laws which create rights and impose obligations or otherwise utilise the supply approved by an appropriation.[491]

In contrast, for Justices Hayne and Kiefel the *Bonus for Working Australians Act (No 2) 2009* (Cth) was validly with the authority of the *Constitution* s 51(ii) when 'read down' with a limited operation, and it was to this extent that the spending was authorised.[492] The powers conferred by s 61 read with s 51(xxxix) were relevant in satisfying the rights created by the *Bonus for Working Australians Act (No 2) 2009* (Cth).[493] They expressly rejected, however, the contention that spending was authorised by s 81:

> Parliamentary appropriation is the process which *permits* application of the Consolidated Revenue Fund to identified purposes … The appropriation of funds, standing alone, does not and never has required application of the amounts appropriated. Any *obligation* to apply the funds to the permitted purpose must be found elsewhere than in the appropriation (emphasis in original).[494]

Meanwhile Justice Heydon found that the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) was not a valid law,[495] albeit he considered that: 'Whether the Executive has power to spend the money will depend on there being either a conferral of that power on it by legislation or some power within s 61 of the *Constitution*'.[496] He expressly stated: 'Section 81 does not create a "legislative power" to confer on the Executive the power to spend what is appropriated'.[497]

The consequence of the High Court's decision in *Pape v Commissioner of Taxation* is that, in addition to finding a valid appropriation law that complies with the *Constitution* ss 81 and 83, there must also be a valid law to spend the amounts appropriated, either authorised by the *Constitution* or a law made under the *Constitution*.[498]

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489 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55 (French CJ).
490 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 89-92 (Gummow, Crennan and Bell JJ).
491 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 73 (Gummow, Crennan and Bell JJ).
492 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 133 (Hayne and Kiefel JJ).
493 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 121 (Hayne and Kiefel JJ). Notably Justices Hayne and Kiefel expressly rejected the authority of the appropriations power and incidental power (ss 51(xxxix) and 81; at 101), executive power (s 61; at 121), 'nationhood' power (at 126) and external affairs (s 51(xxix); at 128) and trade and commerce with other countries and among the States (s 51(i); at 128) as sources of power to validly enact the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth).
494 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 105 (Hayne and Kiefel JJ).
495 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 134 (Heydon J). Justice Heydon expressly rejected trade and commerce with other countries and among the States (s 51(i); at 153), taxation (s 51(ii); at 156-157), external affairs (s 51(xxix); at 168), 'nationhood' power (at 177), executive power with the 'nationhood' power (s 61; at 191), executive power (s 61; at 192-193), executive power and incidental power (ss 51(xxxix) and 61; at 199) and appropriations power (ss 51(xxxix) and 81; at 215) as sources of power to validly enact the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth).
496 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 211 (Heydon J).
497 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 213 (Heydon J).
498 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55-56 (French CJ), 73 (Gummow, Crennan and Bell JJ), 105 (Hayne and Kiefel JJ), 212-213 (Heydon J). See also Gabrielle Appleby, 'There Must be Limits: The Commonwealth Spending Power' (2009) 37 *Federal law Review* 93.

7.7 Expending moneys and amounts

There is a plethora of agreements, arrangements and understandings entered into by the Australian Government in the conduct of its work. Where these involve the expenditure of moneys or the commitment of amounts to be expended in the future, there are restrictions in place to ensure the expenditure and commitments are considered in the context of appropriations. The threshold requirement engaging formal Australian Government processes are that there be an 'arrangement'.[499] The term 'arrangement' means:

> … an arrangement, including a contract or agreement, under which public money is payable or may become payable, other than:
> (a) an arrangement for:
> (i) the engagement of an employee; or
> (ii) the appointment of a person to a statutory office; or
> (iii) the acquisition of particular property or services under a general arrangement with the supplier of those property or services, for the purposes of providing a statutory or employment entitlement; or
> (b) an international agreement governed by international law.

Once a decision is made about contemplating expenditure then there are further requirements in actually making a commitment to expend money and a process to be followed. Specifically the *Financial Management and Accountability Regulations 1997* (Cth) requires the following steps, subject to other specific Agency requirements set out in the *Chief Executive's Instructions*:[500]

(a) *Entering into an arrangement* – To enter into an arrangement that commits the spending of public moneys there must be *both* a 'spending proposal' and a sufficient appropriation of money.[501]

(b) *A 'spending proposal'* – A 'spending proposal' requires an 'approver' who is authorised by the Chief Executive to enter into binding commitments,[502] to make 'reasonable inquires' that the spending will be an 'efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth'.[503]

(c) *A sufficient appropriation of money* – That there is a sufficient appropriation under an existing appropriation, or a proposed appropriation that is before Parliament.[504] And if not, then the arrangement can *only* be entered into where the Finance Minister has agreed in writing.[505] There may also be some additional considerations were third parties ('outsiders') are involved.[506]

(d) *Record in writing* – The approval of a 'spending proposal' should be recorded in writing at the time of the approval, but otherwise the terms of the approval should be recorded in writing 'as soon as practicable after giving the approval'.[507]

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[499] See *Financial Management and Accountability Regulations 1997* (Cth) r 8.
[500] See Department of Finance and Deregulation, *Commonwealth Grant Guidelines: Policies and Principles for Grants Administration*, Financial Management Guidance No 23 (2009) p 9.
[501] *Financial Management and Accountability Regulations 1997* (Cth) r 8.
[502] *Financial Management and Accountability Act 1997* (Cth) s 44(1) ('Note').
[503] *Financial Management and Accountability Act 1997* (Cth) s 44(3); *Financial Management and Accountability Regulations 1997* (Cth) r 9.
[504] *Financial Management and Accountability Regulations 1997* (Cth) r 10.
[505] *Financial Management and Accountability Regulations 1997* (Cth) r 10.
[506] *Financial Management and Accountability Act 1997* (Cth) ss 5 and 12; Department of Finance and Deregulation, *Commonwealth Grant Guidelines: Policies and Principles for Grants Administration*, Financial Management Guidance No 23 (2009) pp 8-9.
[507] *Financial Management and Accountability Regulations 1997* (Cth) r 12.

While there is a plethora of 'arrangements' that must comply with this process, those categorised as 'procurement' or 'grants' have further limitations. The important point being that a contract, arrangement or understanding that involves the expenditure of money might be characterised in a number of ways, and might change its apparent form over time, but it is for the decision-maker to determine its characterisation and be accountable for that decision and its consequences.

7.7.1 Procurement

One of the significant developments in sync with the public administration reforms of the 1980s, 1990s and 2000s has been the privatisation of formerly core government activities and the shift towards the government being a buyer, or procurer, of goods and services.[508] Procuring goods and services has now become a significant aspect of public sector employees' work and now forms an integral part of the public servants delivering on performance. The term 'procurement' captures broadly a specific concept:

> *Procurement* encompasses the whole process of acquiring property or services. It begins when an agency has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract.
> In addition to the acquisition of property or services by an agency for its own use, procurement also encompasses a situation where an agency is responsible for the procurement of property or services for other agencies, or for third parties.[509]

Importantly, procurement relates to the acquisition of property or services, *but* it does not include:

> … grants (whether in the form of a contract or conditional gift);[510] investment (or divestment); sales by tender; loans; purchases of property or services for resale or of property or services used in the production of goods for resale; any property right not acquired through the expenditure of public money - for example, a right to pursue a legal claim for negligence; statutory appointments; appointments made by a Minister using the executive power - for example, the appointment of a person to an advisory board; or the engagement of employees - such as under the *Public Service Act 1999* [(Cth)], the *Parliamentary Services Act 1999* [(Cth)] an agency's enabling legislation, or under the common law concept of employment.[511]

The *Commonwealth Procurement Guidelines* issued by the Finance Minister under the *Financial Management and Accountability Regulations 1997* (Cth) r 7 must be complied with by 'officials' (generally a person employed under the *Public Service Act 1999* (Cth))[512] in Agencies (and prescribed Agencies) under the *Financial Management and Accountability Act 1997* (Cth),[513] and *Commonwealth Authorities and Companies Act 1997* (Cth) s 47A bodies listed in the *Commonwealth Authorities and Companies Regulations 1997* (Cth) Sch 1 and directed by the Finance Minister to apply the *Commonwealth Procurement Guidelines*.[514] The effect of the *Commonwealth Procurement Guidelines* is to establish a process for procurement and impose certain mandatory condition depending on the circumstances of the

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[508] See Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) pp 161-162; Richard Webb and Bernard Pulle, *Public Private Partnerships: An Introduction*, Parliamentary Library Research Paper No 1 2002-03 (2002).

[509] Department of Finance and Deregulation, *Commonwealth Procurement Guidelines*, Financial Management Guidance No 1 (2008) p 10.

[510] See Department of Finance and Deregulation, *Commonwealth Grant Guidelines*, Financial Management Guidance No 23 (2009).

[511] Department of Finance and Deregulation, *Commonwealth Procurement Guidelines*, Financial Management Guidance No 1 (2008) p 10.

[512] Being 'a person who is in an Agency or is part of an Agency': *Financial Management and Accountability Act 1997* (Cth) s 5 ('official'). See also *Financial Management and Accountability Regulations 1997* (Cth) rr 7(2) and 8. Importantly, large numbers of employees engaged by the Australian Government are not engaged under the *Public Service Act 1999* (Cth), but a range of other statutes: see Department of Finance and Deregulation, *Flipchart of FMA Act Agencies/CAC Act Bodies* (2010).

[513] *Financial Management and Accountability Act 1997* (Cth) s 64; *Financial Management and Accountability Regulations 1997* (Cth) r 7.

[514] See also *Finance Minister's (CAC Act Procurement) Directions 2004* (Cth).

procurement.[515] In addition to this there is a plethora of other guidance material, some of which may be relevant (and binding) to a particular procurement situation.[516]

In the context of procurement the framework establishes both formal rules and processes that need to be followed. In essence these are that Chief Executives are responsible for the efficient, effective, economical and ethical use of the Commonwealth's resources 'that is not inconsistent with the policies of the Commonwealth'[517] and must comply as far as possible with the *Commonwealth Procurement Guidelines* issued by the Finance Minister.[518] Further, Chief Executives can establish specific rules and processes according to *Chief Executive's Instructions*.[519]

The original intention of the public administration reforms was to devolve responsibility to Chief Executives and make them personally accountable for their management decisions, including their decisions about procurement.[520] In recent times, however, this has been modified perhaps recognising the failure of some Chief Executives to obtain the lowest prices for their purchases.[521] Thus, the *Commonwealth Procurement Guidelines* now provide:

> … there is provision for coordinated procurement contracting across the whole of government. This aims to enable the Australian Government to achieve better terms commensurate with the aggregated value of its participation in a particular market sector. It will also create efficiencies for agencies and for potential suppliers including through a reduced number of approaches to the market.[522]

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[515] See also Auditor-General and Department of Finance and Administration, *Developing and Managing Contracts: Getting the Right Outcome, Paying the Right Price*, Better Practice Guide (2007).

[516] See, for examples, Department of Finance and Deregulation, *Chief Executive's Instructions and Operational Guidelines for Procurement*, Good Procurement Practice No 1 (2010); Department of Finance and Deregulation, *Guidance on Complying with Policies of the Commonwealth in Procurement*, Financial Management Guidance No 10 (2010); Australian National Audit Office, *Developing and Managing Contracts – Getting the Right Outcome, Paying the Right Price*, Better Practice Guide (2007); Department of Finance and Administration, *Guidance on the Gateway Review Process – A Project Assurance Methodology for the Australian Government*, Financial Management Guidance No 20 (2006); Department of Finance and Administration, *Commonwealth Procurement Guidelines*, Financial Management Guidance No 1 (2005); Department of Finance and Administration, *Guidance on Confidentiality in Procurement*, Financial Management Guidance No 3 (2005); Department of Finance and Administration, *Guidance on the Mandatory Procurement Procedures*, Financial Management Guidance No 13 (2005); Department of Finance and Administration, *Guidance on Ethics and Probity in Government Procurement*, Financial Management Guidance No 14 (2005); Department of Finance and Administration, *Guidance on Procurement Publishing Obligations*, Financial Management Guidance No 15 (2005); Department of Finance and Administration, *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, Department of Finance and Administration, Financial Management Guidance No 8 (2004); Department of Finance and Administration, *Guidance on Identifying Consultancies for Annual Reporting Purposes*, Financial Management Guidance No 12 (2004); and so on.

[517] *Financial Management and Accountability Act 1997* (Cth) s 44. These other policies include: privacy, public works notification, government advertising, and so on: Department of Finance and Deregulation, *Commonwealth Procurement Guidelines*, Financial Management Guidance No 1 (2008) p 7.

[518] *Financial Management and Accountability Act 1997* (Cth) ss 44(2) and 64; *Financial Management and Accountability Regulations 1997* (Cth) r 7; Department of Finance and Deregulation, *Commonwealth Procurement Guidelines*, Financial Management Guidance No 1 (2008).

[519] *Financial Management and Accountability Act 1997* (Cth) ss 52 and 65; *Financial Management and Accountability Regulations 1997* (Cth) r 6.

[520] See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8345 (John Fahey, Minister for Finance). See also Commonwealth, *Parliamentary Debates*, Senate, 14 October 1999, p 9680 (Chris Ellison, Special Minister of State); Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 1999, p 4684 (David Kemp, Minister Assisting the Prime Minister for the Public Service).

[521] The are now mandatory arrangements ('Coordinated Procurement Contracting') for telecommunications, softwares, motor vehicle leasing, government advertising, legal services, and so on: see Department of Finance and Deregulation, *Annual Report 2008-09* (2009) pp 4, 44 and 51. See also the development of 'clustering' and 'piggybacking' strategies: see Department of Finance and Deregulation, *Cooperative Agency Procurement*, Good Procurement Practice No 3 (2007). See also Department of Finance and Deregulation, *Guidance on Complying with Government Policy in Procurement*, Financial Management Guidance No 10 (2010) p 4.

[522] Department of Finance and Deregulation, *Commonwealth Procurement Guidelines*, Financial Management Guidance No 1 (2008) p v.

Further, there is a broader policy framework within which the *Commonwealth Procurement Guidelines* apply and to which 'officials' must comply.[523] These include commitment to whole of government policies addressing intellectual property,[524] 30 day payment for small businesses,[525] issuing indemnities, guarantees, warranties or letters of comfort on behalf of the Commonwealth,[526] and so on.[527] Failure to comply with the *Commonwealth Procurement Guidelines* may result in penalties under the *Financial Management and Accountability Act 1997* (Cth), the *Public Service Act 1999* (Cth) and the *Crimes Act 1914* (Cth).

7.7.2 Grants

Like procurement, grants are an expenditure of public money, albeit the outcome is not the purchase of goods or services, but the doing of something. The *Financial Management and Accountability Regulations 1997* (Cth) r 3(1) provides:

> … a ***grant*** is an arrangement for the provision of financial assistance by the Commonwealth:
> (a) under which public money is to be paid to a recipient other than the Commonwealth; and
> (b) which is intended to assist the recipient achieve its goals; and
> (c) which is intended to promote 1 or more of the Australian Government's policy objectives; and
> (d) under which the recipient is required to act in accordance with any terms or conditions specified in the arrangement.

The *Financial Management and Accountability Regulations 1997* (Cth) r 3(2) then provides that the following are 'not grants':

> (a) the procurement of property or services by an agency, including the procurement of the delivery of a service by a third party on behalf of an agency;
> (b) a gift of public property or public money, including an ex gratia payment;
> (c) a payment of compensation made under:
> (i) an act of grace arrangement; or
> (ii) an arrangement for employment compensation; or
> (iii) a similar arrangement;
> (d) a payment of benefit to a person, including a payment of an entitlement established by legislation or by a government program;
> (e) a tax concession or offset;
> (f) an investment or loan of public money;
> (g) financial assistance provided to a State in accordance with section 96 of the *Constitution*;
> (h) a payment to a State or a Territory that is made for the purposes of the *Federal Financial Relations Act 2009* [(Cth)], including the following:
> (i) General Revenue Assistance;
> (ii) Other General Revenue Assistance;
> (iii) National Specific Purpose Payments;
> (iv) National Partnership Payments;
> (i) a payment that is made for the purposes of the *Local Government (Financial Assistance) Act 1995* [(Cth)];
> (j) a payment that is made for the purposes of the *Schools Assistance Act 2008* [(Cth)];
> (k) a payment that is made for the purposes of the *Higher Education Support Act 2003* [(Cth)];
> (l) a payment of assistance for the purposes of Australia's international development assistance program, which is treated by the Commonwealth as official development assistance.

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523 See Department of Finance and Deregulation, *Guidance on Complying with Government Policy in Procurement*, Financial Management Guidance No 10 (2010) pp 3-7; Department of Finance and Deregulation, *Commonwealth Procurement Guidelines*, Financial Management Guidance No 1 (2008) pp 3 and 18.

524 Attorney-General's Department, *Statement of IP Principles for Australian Government Agencies* (2008).

525 Department of Finance and Deregulation, *Procurement 30 Day Payment Policy for Small Business*, Finance Circular 2008/10 (2008).

526 Department of Finance and Administration, *Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort*, Financial Management Guidance No 6 (2003).

527 See Department of Finance and Deregulation, *Guidance on Complying with Government Policy in Procurement*, Financial Management Guidance No 10 (2010) pp 3-7.

The *Commonwealth Grant Guidelines* issued by the Finance Minister under the *Financial Management and Accountability Regulations 1997* (Cth) r 7 must be compiled with by 'officials' (generally a person employed under the *Public Service Act 1999* (Cth))[528] in Agencies (and prescribed Agencies) under the *Financial Management and Accountability Act 1997* (Cth).[529] The effect of the *Commonwealth Grant Guidelines* is to establish a process for granting and impose certain mandatory condition depending on the circumstances of the grant.[530] In addition to this there is other guidance material, some of which may be relevant (and binding) to a particular granting situation.[531]

In the context of grants the framework establishes both formal rules and processes that need to be followed with Chief Executives responsible for the efficient, effective, economical and ethical use of the Commonwealth's resources 'that is not inconsistent with the policies of the Commonwealth'.[532] There then needs to be compliance with the *Commonwealth Grants Guidelines* issued by the Finance Minister,[533] with Chief Executives establishing specific rules and processes according to *Chief Executive's Instructions*.[534]

7.7.3 Other payments

The *Financial Management and Accountability Regulations 1997* (Cth) r 3(2) provides a list of payments that are 'not grants'. There remains, of course, some ambiguity in deciding when a payment is for a 'loan' which might be repaid at some time in the future (and further when this becomes an investment),[535] or a liability that extinguishes on payment.

7.8 'Financial assistance' to the States

The *Constitution* s 96 makes specific provision for the Parliament to 'grant financial assistance' to the States:

> During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.[536]

The text suggests a wide and general power albeit this was not the original intention at Federation:[537]

> It is hard to see on what grounds this power can be denied; though undoubtedly it is a power which is not intended to be used, and ought not to be used, except in cases of emergency. Such a grant would certainly be 'financial

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[528] Being 'a person who is in an Agency or is part of an Agency': *Financial Management and Accountability Act 1997* (Cth) s 5 ('official'). See also *Financial Management and Accountability Regulations 1997* (Cth) rr 7A(2) and 8.

[529] *Financial Management and Accountability Act 1997* (Cth) s 64; *Financial Management and Accountability Regulations 1997* (Cth) r 7A. See also Australian National Audit Office, *Implementing Better Practice Grants Administration*, Better Practice Guide (2010); Department of Finance and Deregulation, *Grants and Other Common Financial Arrangements*, Finance Circular No 2009/03 (2009); Department of Finance and Deregulation, *Grants – Reporting Requirements*, Finance Circular No 2009/04 (2009); and so on.

[530] See Department of Finance and Deregulation, *Commonwealth Grant Guidelines: Policies and Principles for Grants Administration*, Financial Management Guidance No 23 (2009) p 3.

[531] See, for examples, the particular Agency's *Chief Executive Instructions*; and so on: Department of Finance and Deregulation, *Commonwealth Grant Guidelines: Policies and Principles for Grants Administration*, Financial Management Guidance No 23 (2009) p 6.

[532] *Financial Management and Accountability Act 1997* (Cth) s 44. These other policies include: privacy, government advertising, anti-discrimination, social inclusion, freedom of information, and so on: see Department of Finance and Deregulation, *Commonwealth Grant Guidelines: Policies and Principles for Grants Administration*, Financial Management Guidance No 23 (2009) p 9.

[533] *Financial Management and Accountability Act 1997* (Cth) ss 44(2) and 64; *Financial Management and Accountability Regulations 1997* (Cth) r 7A; Department of Finance and Deregulation, *Commonwealth Grant Guidelines: Policies and Principles for Grants Administration*, Financial Management Guidance No 23 (2009).

[534] *Financial Management and Accountability Act 1997* (Cth) ss 52 and 65; *Financial Management and Accountability Regulations 1997* (Cth) r 6.

[535] See *Financial Management and Accountability Act 1997* (Cth) s 39.

[536] *Constitution* s 96.

[537] See John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 870-871.

> assistance' of the most direct and substantial kind; and financial assistance of precisely the kind required to guard against the burden of unnecessary taxation which has been prophesied as the inevitable result of the inelastic provisions of the distribution clauses. It would in fact be, to a certain extent, a recognition that, in cases of emergency, the principle of distribution according to contributions might be tempered in the direction of distributions according to needs … [T]he section is intended as 'the medicine, not the daily food', of the Constitution; and that it is not to supersede or render nugatory the distribution clauses by allowing distribution according to the will of the Parliament.[538]

The High Court has, however, confounded this limited role for s 96 and enabled the Commonwealth to dominate.[539]

South Australia v Commonwealth (1942) 65 CLR 373

In *South Australia v Commonwealth* ('*First Uniform Tax case*') various States challenged the validity of the *States Grants (Income Tax Reimbursement) Act 1942* (Cth), *Income Tax (War-time Arrangements) Act 1942* (Cth), *Income Tax Assessment Act 1942* (Cth), *Income Tax Act 1942* (Cth) as 'a scheme for the purpose of compelling the States to abandon their constitutional right to impose taxation on incomes' by imposing a tax at such a high rate that the States could not practically also levy an income tax.[540] The result would be, the States argued, to undermine their financial positions.[541] The carrot from the Commonwealth was that the *States Grants (Income Tax Reimbursement) Act 1942* (Cth) then offered grants of money back to the States as a reimbursement of the foregone tax on condition the States did not also levy a tax.[542] The States argued, in part, that the *States Grants (Income Tax Reimbursement) Act 1942* (Cth) was not within the powers of the Commonwealth Parliament as a valid exercise of the *Constitution* s 96.[543] The High Court majority (Justice Starke dissenting)[544] decided that the *States Grants (Income Tax Reimbursement) Act 1942* (Cth) was valid, and that the Commonwealth could both offer money to induce States to exercise their powers[545] and induce States not to exercise their powers.[546] As a consequence, the majority concluded that the *States Grants (Income Tax Reimbursement) Act 1942* (Cth) was valid.[547] Significantly, the majority decisions outline the incredibly broad potential for the Commonwealth under the auspices of the *Constitution* s 96: Chief Justice Latham, with whom Justice Rich agreed,[548] stated:

> The Commonwealth may properly induce a State to exercise its powers … by offering a money grant. So also the Commonwealth may properly induce a State by the same means to abstain from exercising its powers. For example, the Commonwealth might wish to exercise the powers given by the *Constitution* ss 51 (xiii) and (xiv) to legislate with respect to banking, other than State banking, and insurance, other than State insurance. The Commonwealth might wish to set up some Federal system of banking or insurance without any State competition. If the States were deriving revenue from State banking or State insurance, they might be prepared to retire from such activities upon

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[538] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) pp 870-871.

[539] See *Victoria v Commonwealth* (1957) 99 CLR 575 at 611 (Dixon CJ), 623-624 (McTiernan J), 629 (Williams J), 641 (Webb J), 655 (Fullagar J), 658 (Kitto J), 658-659(Taylor J); *South Australia v Commonwealth* (1942) 65 CLR 373 at 417 (Latham CJ), 436 (Rich J), 448-449 and 451 (McTiernan J), 464 (Williams J); *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735 at 760 and 761 (Latham CJ), 767 (Rich J), 774 (Starke J), 809 (McTiernan J); *Victoria v Commonwealth* (1926) 38 CLR 399 at 406 (Knox CJ, Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ). See also Cheryl Saunders, 'Towards a Theory for Section 96' (1987) 16 *Melbourne University Law Review* 699; Cheryl Saunders, 'Towards a Theory for Section 96' (1987) 16 *Melbourne University Law Review* 1.

[540] *South Australia v Commonwealth* (1942) 65 CLR 373 at 405 (Latham CJ), 439 (Starke J), 462-463 (Williams J).

[541] *South Australia v Commonwealth* (1942) 65 CLR 373 at 405 (Latham CJ), 463 (Williams J).

[542] *South Australia v Commonwealth* (1942) 65 CLR 373 at 406 (Latham CJ), 442 (Starke J), 454-456 (McTiernan J), 463-464 (Williams J).

[543] *South Australia v Commonwealth* (1942) 65 CLR 373 at 406 (Latham CJ), 442-443 (Starke J).

[544] *South Australia v Commonwealth* (1942) 65 CLR 373 at 443-444 (Starke J).

[545] See also *Victoria v Commonwealth* (1926) 38 CLR 399 at 406 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ) finding that the *Federal Aid Roads Act 1926* (Cth) granting assistance to the States to make roads was valid and 'plainly warranted by the provisions of s 96 of the *Constitution*'.

[546] *South Australia v Commonwealth* (1942) 65 CLR 373 at 417 (Latham CJ), 436 (Rich J), 448-449 and 451 (McTiernan J), 464 (Williams J).

[547] *South Australia v Commonwealth* (1942) 65 CLR 373 at 427 (Latham CJ), 436 (Rich J), 460 (McTiernan J), 464 (Williams J).

[548] See *South Australia v Commonwealth* (1942) 65 CLR 373 at 436 (Rich J).

> receiving what they regarded as adequate compensation. The Commonwealth could properly, under Commonwealth legislation, make grants to the States upon condition of them so retiring. The States could not abdicate their powers by binding themselves not to re-enter the vacated field, but if the Commonwealth, aware of this possibility, was prepared to pay money to a State which in fact gave up its system of State banking or insurance, there could be no objection on this ground to the validity of the Commonwealth law which authorized the payment.
>
> But the position is radically different, it is urged, if the so-called inducement practically amounts to coercion. Admittedly the Commonwealth Parliament could not pass a law compelling a State to surrender the power to tax incomes or prohibiting the exercise of that power by a State. Equally, it is said, the Commonwealth cannot lawfully make an offer of money to a State which, under the conditions which actually exist, the State cannot, on political or economic grounds, really refuse.
>
> This identification of a very attractive inducement with legal compulsion is not convincing. Action may be brought about by temptation – by offering a reward – or by compulsion. But temptation is not compulsion. A person whose hand is physically propelled by another person against his will so that it strikes a blow is not guilty of assault. But it would be no defence to allege that he really could not help striking the blow because he was offered £1,000 for doing it.[549]

And:

> Grants Act does not compel the States to abandon their legislative power to impose a tax upon incomes. States which do not abstain from imposing income tax cannot be said to be acting unlawfully. There is no command that they shall not impose such a tax.[550]

Of particular importance Chief Justice Latham then also states:

> It is perhaps not out of place to point out that the scheme which the Commonwealth has applied to income tax of imposing rates so high as practically to exclude State taxation could be applied to other taxes so as to make the States almost completely dependent, financially and therefore generally, upon the Commonwealth. If the Commonwealth Parliament, in a grants Act, simply provided for the payment of moneys to States, without attaching any conditions whatever, none of the legislation could be challenged by any of the arguments submitted to the Court in these cases. The amount of the grants could be determined in fact by the satisfaction of the Commonwealth with the policies, legislative or other, of the respective States, no reference being made to such matters in any Commonwealth statute. Thus, if the Commonwealth Parliament were prepared to pass such legislation, all State powers would be controlled by the Commonwealth – a result which would mean the end of the political independence of the States. Such a result cannot be prevented by any legal decision. The determination of the propriety of any such policy must rest with the Commonwealth Parliament and ultimately with the people. The remedy for alleged abuse of power or for the use of power to promote what are thought to be improper objects is to be found in the political arena and not in the Courts.[551]

Justice McTiernan stated:

> Section 96 does not bind the Parliament to give equal grants to the States. A law granting financial assistance is not a law or a regulation of revenue under s 99. Section 96 leaves to the judgment of Parliament the question of deciding to what State or States it will grant financial assistance, the amount of the grant, and the terms and conditions of the grant.[552]

Victoria v Commonwealth (1957) 99 CLR 575

Then in *Victoria v Commonwealth* (*'Second Uniform Tax case'*) the High Court re-affirmed the broad ambit of the *Constitution* s 96.[553] In this case States challenged the validity of provisions in the *Income Tax and Social Services Contribution Assessment Act 1936* (Cth) and the *States Grants (Tax Reimbursement) Act 1946* (Cth), arguing that the earlier decision in *South Australia v Commonwealth* (*'First Uniform Tax*

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[549] *South Australia v Commonwealth* (1942) 65 CLR 373 at 417 (Latham CJ).
[550] *South Australia v Commonwealth* (1942) 65 CLR 373 at 418-419 (Latham CJ).
[551] *South Australia v Commonwealth* (1942) 65 CLR 373 at 429 (Latham CJ).
[552] *South Australia v Commonwealth* (1942) 65 CLR 373 at 451 (McTiernan J).
[553] See *Victoria v Commonwealth* (1957) 99 CLR 575 at 611 (Dixon CJ), 622-623 (McTiernan J), 629 (Williams J), 641 (Webb J), 655 (Fullagar J), 658 (Kitto J), 658-659 (Taylor JJ).

case') was either wrongly decided or 'by distinguishing it as a decision resting in an essential degree on the scope of the defence power in time of war'.[554] The High Court rejected these arguments and upheld the validity of the *States Grants (Tax Reimbursement) Act 1946* (Cth).[555] The significance of this decision was to confirm and entrench the very broad ambit of the *Constitution* s 96. For example, Chief Justice Dixon stated:[556]

> … it is apparent that the power to grant financial assistance to any State upon such terms and conditions as the Parliament thinks fit is susceptible of a very wide construction in which few if any restrictions can be implied. For the restrictions could only be implied from some conception of the purpose for which the particular power was conferred upon the Parliament or from some general constitutional limitations upon the powers of the Parliament which otherwise an exercise of the power given by s 96 might transcend. In the case of what may briefly be described as coercive powers it may not be difficult to perceive that limitations of such a kind must be intended. But in s 96 there is nothing coercive. It is but a power to make grants of money and to impose conditions on the grant, there being no power of course to compel acceptance of the grant and with it the accompanying term or condition.
>
> There has been what amounts to a course of decisions upon s 96 all amplifying the power and tending to a denial of any restriction upon the purpose of the appropriation or the character of the condition …[557]

In short, the *Constitution* s 96 empowers the Commonwealth Parliament to make grants of money to States on *any* matters even in an attempt to influence their legislative or executive powers, including condition whose 'intended operation may interfere unconstitutionally with the governmental functions of the State in such a way as to take the law outside federal power'.[558] The limitation,[559] however, is that despite the grants being made on conditions (including no conditions), there is *no* authority to enforce the conditions once the grant has been paid (unlike a contract):[560]

> For the essence of an exercise of that power must be a grant of money or its equivalent and beyond that the legislature can go no further than attaching conditions to the grant. Once it is certain that a law which is either valid under s 96 or not at all does contain a grant of financial assistance to the States, the further inquiry into its validity could not go beyond the admissibility of the terms and conditions that the law may have sought to impose. The grant of money may supply the inducement to comply with the term or condition. But beyond that no law passed under s 96 can go.[561]

The result of the High Court's interpretation has been an expansive power for the Australian Government to establish a complex arrangement for grants of money to the States (and Territories) and the evolution of these arrangements. The conception of the financial relations between the Commonwealth and the States (and Territories) founds the evolving arrangements:

> Australia's federal relations are characterised by three broad features:
> - the financial arrangements are influenced by the large expenditure responsibilities of the States relative to their revenue capacities, so that they rely on transfers from the Commonwealth to finance their activities – referred to as vertical fiscal imbalance;

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[554] *Victoria v Commonwealth* (1957) 99 CLR 575 at 601 (Dixon CJ), 628-629 (Williams J), 641 (Webb J), 654 (Fullagar J).

[555] *Victoria v Commonwealth* (1957) 99 CLR 575 at 611 (Dixon CJ), 623-624 (McTiernan J), 629 (Williams J), 641 (Webb J), 655 (Fullagar J), 658 (Kitto J), 658-659(Taylor J).

[556] See also *Victoria v Commonwealth* (1957) 99 CLR 575 at 605-609 (Dixon CJ) (and 659 (Taylor J)) setting out an analysis of the breadth of statutory schemes considered by the earlier cases and validly within the *Constitution* s 96 power.

[557] *Victoria v Commonwealth* (1957) 99 CLR 575 at 605 (Dixon CJ).

[558] *Victoria v Commonwealth* (1957) 99 CLR 575 at 610 (Dixon CJ).

[559] Other limitations may arise from obligations and responsibilities imposed by the *Constitution*, such as conditions affecting religion: see *Attorney-General (Vic); Ex rel Black v Commonwealth* (1980) 146 CLR 559 at 576 (Barwick CJ), 592-593 (Gibbs J), 618 (Mason J), 621 (Murphy J), 651 (Wilson J). Notably, however, discriminating taxes (*Constitution* s 51(ii)), non-uniform bounties (*Constitution* s 51(iii)) and preference in trade, commerce and revenue (*Constitution* s 99) do not: see, for example, *Deputy Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735 at 763-765 (Latham CJ), 775 (Starke J).

[560] See also *Victoria v Commonwealth* (1957) 99 CLR 575 at 642-643 (Webb J).

[561] *Victoria v Commonwealth* (1957) 99 CLR 575 at 610 (Dixon CJ).

- the States have different capacities to raise revenue and deliver services – referred to as horizontal fiscal imbalance; and
- overlapping roles and responsibilities in areas of government activity which can lead to sectors where regulation or services remain fragmented, with duplication of activities, lack of coordination and blurred accountabilities.[562]

The most recent arrangements was the 2008 COAG *Intergovernmental Agreement on Federal Financial Relations* that was intended to enable the Commonwealth, the States and the Territories to 'collaborate on policy development and service delivery', *and* 'facilitate the implementation of economic and social reforms' *and both* 'in areas of national importance':[563]

> The objective of the framework for federal financial relations is the improvement of the well-being of all Australians through:
> (a) collaborative working arrangements, including clearly defined roles and responsibilities and fair and sustainable financial arrangements, to facilitate a focus by the Parties on long term policy development and enhanced government service delivery;
> (b) enhanced public accountability through simpler, standardised and more transparent performance reporting by all jurisdictions, with a focus on the achievement of outcomes, efficient service delivery and timely public reporting;
> (c) reduced administration and compliance overheads;
> (d) stronger incentives to implement economic and social reforms;
> (e) the on-going provision of Goods and Services Tax (GST) payments to the States and Territories equivalent to the revenue received from the GST; and
> (f) the equalisation of fiscal capacities between States and Territories.[564]

The significant aspect of the *Intergovernmental Agreement on Federal Financial Relations* has been to confirm the power and authority of the Commonwealth to assert control over areas of State responsibility that were not apparent at the time of Federation by linking the payments (transfers) to the States and Territories with conditions.[565] The forms of payments (transfers) specifically include:

> The Commonwealth commits to the provision of on-going financial support for the States' and Territories' service delivery efforts, through:
> (a) general revenue assistance, including the on going provision of GST payments, to be used by the States and Territories for any purpose;
> (b) National Specific Purpose Payments (SPPs) to be spent in the key service delivery sectors; and
> (c) National Partnership payments to support the delivery of specified outputs or projects, to facilitate reforms or to reward those jurisdictions that deliver on nationally significant reforms.[566]

The SPPs include the National Healthcare SPP, the National Schools SPP, the National Skills and Workforce Development SPP, the National Disability Services SPP and the National Affordable Housing SPP.[567] Each of the SPPs addresses an area that is outside the scope of the Commonwealth's direct responsibilities under the *Constitution*. Other payments address National Partnership payments 'to support the delivery of specified outputs or projects, to facilitate reforms

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[562] *Australia's Federal Relations*, Budget Paper No 3 2009-2010 (2009) p 9.

[563] *Intergovernmental Agreement on Federal Financial Relations* (2008) cl 1. See also Council of Australian Governments, *Communiqué*, 29 November 2008.

[564] *Intergovernmental Agreement on Federal Financial Relations* (2008) cl 5. See also Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2009-2010 (2009) p 9.

[565] See, for examples, Denis James, *Federal-State Financial Relations: The Deakin Prophesy*, Parliamentary Library Research Paper No 17 (2001) pp 1-22; Alan Fenna, 'Commonwealth Fiscal Power and Australian Federalism' (2008) 31 *University of NSW Law Journal* 509 at 513-516; Cheryl Saunders 'The Development of the Commonwealth Spending Power' (1978) 11 *Melbourne University Law Review* 369. See also Allen Consulting Group, *Governments Working Together? Assessing Specific Purpose Payments* (2006); Ross Garnaut and Vince Fitzgerald, *Review of Commonwealth-State Funding: Final Report* (2002); Joint Committee of Public Accounts, *The Administration of Specific Purpose Payments: A Focus on Outcomes* (1995).

[566] *Intergovernmental Agreement on Federal Financial Relations* (2008) cl 19(b). See also Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2009-2010 (2009) pp 9-10.

[567] See *Intergovernmental Agreement on Federal Financial Relations* (2008) cl 20 and sch F.

or to reward those jurisdictions that deliver on nationally significant reforms'[568] and 'general revenue assistance, including the on-going provision of GST payments, to be used by the States and Territories for any purpose'.[569] There remains contentions about the reform of these payments and the balance between the Commonwealth and the States and Territories in making these payments, recognising the authority they provide to the Executive to direct and control the provisions of goods and services in the States and Territories.[570]

7.9 The Auditor-General

The Auditor-General under the *Auditor-General Act 1997* (Cth) is an integral part of the Executive's transparency and accountability arrangements,[571] emphasising an 'independent assurance' about the Executive's performance, propriety and accountability 'giving credibility to Australia's system of parliamentary governance'.[572] The 'independence' of the Auditor-General is central to the credibility of Parliamentary control over the Executive:[573]

> In order that the Auditor-General's audits and reports be accepted as valid, it is essential that the Auditor-General should not be subject nor be suspected of being subject to pressure from the Executive or Legislative arms of government to report in one way or another. In other words, his independence is fundamental to the objectivity of his judgments and acceptance of the latter. Without statutory independence there could be doubts over whether he impartially exercises his functions.[574]

The *Auditor-General Act 1997* (Cth) establishes the office of 'Auditor-General'.[575] According to the *Administrative Arrangements Order* this is an office within the portfolio of The Prime Minister and Cabinet.[576] The Auditor-General is appointed by the Governor-General for one term of 10 years based on the recommendation of the Prime Minister.[577] However, the Prime Minister must have referred the proposed recommendation to the Parliament's JCPAA for approval, and then received their approval (a right of veto) before making any recommendation.[578] The Governor-General can remove the Auditor-General if each House of the Parliament, in the same session of the Parliament,

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[568] *Intergovernmental Agreement on Federal Financial Relations* (2008) cls 19(c) and 24. See also Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2009-2010 (2009) pp 9-10. The 'National Partnership payments' are the old SPPs 're-styled': see Alan Fenna, 'Commonwealth Fiscal Power and Australian Federalism' (2008) 31 *University of NSW Law Journal* 509 at 528.

[569] *Intergovernmental Agreement on Federal Financial Relations* (2008) cls 19(a) and 25. See also Department of Finance and Deregulation, *Australia's Federal Relations*, Budget Paper No 3 2009-2010 (2009) pp 9-10.

[570] See, for examples, Michael Keating, Geoff Anderson, Meredith Edwards and George Williams, *A Framework to Guide the Future Development of Specific Purpose Payments* (2007); Allen Consulting Group, *Governments Working Together? Assessing Specific Purpose Payments* (2006); Ross Garnaut and Vince Fitzgerald, *Review of Commonwealth-State Funding: Final Report* (2002); Joint Committee of Public Accounts, *The Administration of Specific Purpose Payments: A Focus on Outcomes* (1995).

[571] For the relevant arrangements under the repealed Act see *Audit Act 1901* (Cth), ss 3-15. See also Joint Committee of Public Accounts, *The Auditor General: Ally of the People and Parliament*, Report No 296 (1989) pp 57-58.

[572] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8344 (John Fahey, Minister for Finance); Senate, 5 March 1997, p 1351 (Ian Campbell, Parliamentary Secretary to the Treasurer). See also Joint Committee of Public Accounts, *The Auditor General: Ally of the People and Parliament*, Report No 296 (1989) pp 9 and 12; Auditor-General, *Accountability, Independence and Objectivity: A Response to Report 296 of the Parliamentary Joint Committee of Public Accounts* (1989) pp 7-8; Auditor-General, *Parliament's Right to Know: Legislation to Replace the Audit Act 1901*, Audit Report No 43 1993-94 (1994) p ix; Joint Committee of Public Accounts, *Guarding the Independence of the Auditor-General*, Report No 346 (1996) pp 6-7; Joint Committee of Public Accounts and Audit, *Review of the Auditor-General Act 1997*, Report No 386 (2001) p 1; Taylor J, 'Parliament and the Auditor-General' in Dermody K (ed), *Republicanism, Responsible Government and Human Rights*, Papers on Parliament No 26 (1995) pp 61-62.

[573] See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8344 (John Fahey, Minister for Finance); Senate, 5 March 1997, p 1351 (Ian Campbell, Parliamentary Secretary to the Treasurer).

[574] Joint Committee of Public Accounts, *The Auditor General: Ally of the People and Parliament*, Report No 296 (1989) p 58. See also Auditor-General, *Accountability, Independence and Objectivity: A Response to Report 296 of the Parliamentary Joint Committee of Public Accounts* (1989) pp 1 and 10.

[575] *Auditor-General Act 1997* (Cth) s 7(1).

[576] *Administrative Arrangements Order*, 14 October 2010, pt 15.

[577] *Auditor-General Act 1997* (Cth) sch 1 (item 1). See also *Acts Interpretation Act 1901* (Cth) s 19A; *Administrative Arrangements Order*, 14 October 2010, pt 15.

[578] *Auditor-General Act 1997* (Cth) sch 1 (item 2). See also *Public Accounts and Audit Committee Act 1951* (Cth) s 8A(1).

requests the Auditor-General's removal on the ground of 'misbehaviour or physical or mental incapacity'.[579] The Governor-General must also remove the Auditor-General if the Auditor-General 'becomes bankrupt', 'applies to take the benefit of any law for the relief of bankrupt or insolvent debtors', 'compounds with his or her creditors', or 'assigns his or her remuneration for the benefit of his or her creditors'.[580] The 'independence' of the Auditor-General is expressly addressed in the *Auditor-General Act 1997* (Cth), providing:

> **8 Independence of the Auditor-General**
> (1) The Auditor-General is an independent officer of the Parliament.
> (2) The functions, powers, rights, immunities and obligations of the Auditor-General are as specified in this Act and other laws of the Commonwealth. There are no implied functions, powers, rights, immunities or obligations arising from the Auditor-General being an independent officer of the Parliament.
> (3) The powers of the Parliament to act in relation to the Auditor-General are as specified in or applying under this Act and other laws of the Commonwealth. For this purpose, Parliament includes:
> (a) each House of the Parliament; and
> (b) the members of each House of the Parliament; and
> (c) the committees of each House of the Parliament and joint committees of both Houses of the Parliament.
> There are no implied powers of the Parliament arising from the Auditor-General being an independent officer of the Parliament.
> (4) Subject to this Act and to other laws of the Commonwealth, the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers. In particular, the Auditor-General is not subject to direction from anyone in relation to:
> (a) whether or not a particular audit is to be conducted; or
> (b) the way in which a particular audit is to be conducted; or
> (c) the priority to be given to any particular matter.

This 'independence' is tempered by the requirement that the Auditor-General in 'performing or exercising his or her functions or powers' must 'have regard' to 'the audit priorities of the Parliament determined by the [JCPAA]',[581] and any reports made by the JCPAA.[582] These 'functions and powers' include conducting audits of financial statements of Agencies under the *Financial Management and Accountability Act 1997* (Cth) and Commonwealth authorities and companies (and their subsidiaries) under the *Commonwealth Authorities and Companies Act 1997* (Cth),[583] and 'performance audits'[584] of Agencies under the *Financial Management and Accountability Act 1997* (Cth) and Commonwealth authorities and companies (other than 'government business enterprises' unless a specific request has been made)[585] under the *Commonwealth Authorities and Companies Act 1997* (Cth).[586] Other powers include the provision of advice,[587] setting auditing standards,[588] providing reports to Ministers and Federal Parliament,[589] conducting audits by arrangement (albeit within the scope of the Commonwealth's legislative power),[590] and so on. Despite these apparently broad areas, there remain key areas beyond the reach of the Auditor-General, such as auditing GBEs, auditing performance indicators, and getting past claims of legal professional privilege, and some limitations on the Auditor-General's performance.[591]

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[579] *Auditor-General Act 1997* (Cth) sch 1 (item 6(1)).
[580] *Auditor-General Act 1997* (Cth) sch 1 (item 6(2)).
[581] *Auditor-General Act 1997* (Cth) s 10(a). See also *Public Accounts and Audit Committee Act 1951* (Cth) s 8(1)(m).
[582] *Auditor-General Act 1997* (Cth) s 10(b). See also *Public Accounts and Audit Committee Act 1951* (Cth) ss 8(1)(h) and (i).
[583] *Auditor-General Act 1997* (Cth) ss 11-13.
[584] Meaning 'a review or examination of any aspect of the operations of the person or body': *Auditor-General Act 1997* (Cth) s 5(1).
[585] *Auditor-General Act 1997* (Cth) s 16(2).
[586] *Auditor-General Act 1997* (Cth) ss 15-18.
[587] *Auditor-General Act 1997* (Cth) s 23.
[588] *Auditor-General Act 1997* (Cth) s 24.
[589] *Auditor-General Act 1997* (Cth) ss 25-26.
[590] *Auditor-General Act 1997* (Cth) s 20(3). These include 'assurance activities': see Joint Committee of Public Accounts and Audit, *Inquiry into the Auditor-General Act 1997*, Report No 419 (2010) pp 7-13.
[591] See Joint Committee of Public Accounts and Audit, *Inquiry into the Auditor-General Act 1997*, Report No 419 (2010) pp 15-49.

Other important powers of the Auditor-General are those associated with accessing documents and information. The Auditor-General is expressly empowered to 'direct a person to do all or any of the following' including providing requested information, attending and giving evidence, produce documents, and answer questions,[592] subject to criminal sanctions for failure to comply.[593] The Auditor-General may also enter and remain on any premises occupied by the Commonwealth, a Commonwealth authority or a Commonwealth company, fully and freely access any documents or other property, and examine and copy any document,[594] subject to criminal sanctions for failure to comply.[595] These powers are, however, limited so that accessible documents and information:

> (a) is limited by laws of the Commonwealth … relating to the powers, privileges and immunities of:
> (i) each House of the Parliament; and
> (ii) the members of each House of the Parliament; and
> (iii) the committees of each House of the Parliament and joint committees of both Houses of the Parliament; but
> (b) is not limited by any other law … except to the extent that the other law expressly excludes the operation of [powers associated with accessing documents and information].[596]

The relevant governance arrangements for the Auditor-General also include formal controls over expenditure,[597] the provision of draft estimates for budgeting purposes,[598] the provision of financial information to the 'Finance Minister',[599] the engagement of staff under the *Public Service Act 1999* (Cth)[600] to assist the Auditor-General in performing the Auditor-General's functions,[601] tabling in Parliament a report on 'the operations of the Audit Office during that year',[602] and compliance with the Australian Government's other financial arrangements under the *Financial Management and Accountability Act 1997* (Cth) that includes certain directions and accountabilities to the 'Finance Minister'.[603] Special provisions are made in respect of the intelligence or security agencies.[604]

The formal elements of the *Auditor-General Act 1997* (Cth) that establish the 'independence' of the Auditor-General is that:[605]

- The Auditor-General is an independent officer of the Parliament;[606]
- The Auditor-General is appointed by the Governor-General following the approval of the JCPAA;[607]

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592 *Auditor-General Act 1997* (Cth) ss 32(1) and (2).
593 *Auditor-General Act 1997* (Cth) s 32(3).
594 *Auditor-General Act 1997* (Cth) s 33(1).
595 *Auditor-General Act 1997* (Cth) s 33(3).
596 Notably, these powers may not be exercised by the Auditor-General for audits by arrangement, the provision of advice, and the provision of reports to Ministers and Federal Parliament: *Auditor-General Act 1997* (Cth) s 31. See also Joint Committee of Public Accounts and Audit, *Inquiry into the Auditor-General Act 1997*, Report No 419 (2010) p 64.
597 There is a requirement for an appropriation and a 'drawing right' for the expenditure on money: *Auditor-General Act 1997* (Cth) ss 50-51. See also *Financial Management and Accountability Act 1997* (Cth) ss 26 and 27(drawing right).
598 *Auditor-General Act 1997* (Cth) s 53. Notably, this requirement is complied with by providing the relevant estimates to the Joint Committee of Public Accounts and Audit.
599 *Auditor-General Act 1997* (Cth) s 54. Notably, the 'Finance Minister' is required to report to the Joint Committee of Public Accounts and Audit and set out the reasons for making the request for the financial information.
600 Notably, the Auditor-General and the staff engaged under the *Public Service Act 1999* (Cth) are a 'statutory agency': *Auditor-General Act 1997* (Cth) s 40(1A); *Public Service Act 1999* (Cth) s 9.
601 *Auditor-General Act 1997* (Cth) s 40(1).
602 *Auditor-General Act 1997* (Cth) s 28. Presumably this report also satisfies the annual reporting requirements of the *Public Service Act 1999* (Cth) ss 63 and 70.
603 Notably, the Auditor-General and the staff engaged under the *Public Service Act 1999* (Cth) (and outside contractors) are a 'prescribed Agency': *Financial Management and Accountability Act 1997* (Cth) s 5; *Financial Management and Accountability Regulations 1997* (Cth) r 5 and sch 1 (item 116).
604 *Auditor-General Act 1997* (Cth) s 56.
605 See also Joint Committee of Public Accounts and Audit, *Inquiry into the Auditor-General Act 1997*, Report No 419 (2010) pp 51-56; Australian National Audit Office, *About the Australian National Audit Office* (2008) p 6.
606 *Auditor-General Act 1997* (Cth) s 8(1)(a).

- The Auditor-General is appointed for a 10 year period;[608]
- The Auditor-General can only be dismissed by a resolution of both Houses of the Parliament for 'misbehaviour or physical or mental incapacity';[609] and
- The Auditor-General cannot be directed by anybody in relation to his or her functions.[610]

However, the policy environment of government and the matrix of formal regulations applying to the Auditor-General are more complex and varied than just the *Auditor-General Act 1997* (Cth). The various other influences on the Auditor-General's 'independence' under the *Auditor-General Act 1997* (Cth) need to be considered in a broader context.[611]

7.10 The Parliamentary Budget Office

The Joint Select Committee on the Parliamentary Budget Office recently reported recommending a Parliamentary Budget Office be established 'to inform the Parliament by providing independent, non-partisan and policy neutral analysis on the full Budget cycle, fiscal policy and the financial implications of proposals'.[612] This promises to provide a new part of the Executive's transparency and accountability arrangements.

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[607] *Auditor-General Act 1997* (Cth) s 9 and sch 1 (items 1 and 2).
[608] *Auditor-General Act 1997* (Cth) s 9 and sch1 1 (item 1).
[609] *Auditor-General Act 1997* (Cth) s 9 and sch 1 (item 6(1)).
[610] *Auditor-General Act 1997* (Cth) s 8(4).
[611] See Charles Lawson, 'Can the Executive Influence the "Independence" of the Auditor-General under the *Auditor-General Act 1997* (Cth)?' (2009) 16 *Australian Journal of Administrative Law* 90.
[612] The Joint Select Committee on the Parliamentary Budget Office is presently investigating these matters.

8. Employment arrangements

8.1 Introduction

The *Constitution* provides for the 'appointment of civil servants':

> Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.[1]

This provision addresses the appointment of *all* Federal officials other than Ministers of State.[2] There are now a range of Federal officials appointed by the Governor-General in Council (the Governor-General acting on the advice of the Federal Executive Council),[3] although the majority of appointments are according to the powers vested by 'a law of the Commonwealth'. Of these laws of the Commonwealth, the vast majority of appointments are now made under the *Public Service Act 1999* (Cth). The significance of the *Constitution* is that the Parliament has ultimate authority to determine the appointment and removal of officers of the Executive, other than Ministers,[4] but that the Parliament has assigned this task to the Executive through legislation such as the *Public Service Act 1999* (Cth) while maintaining an oversight role.[5]

The *Public Service Act 1999* (Cth) is the latest in the evolution of employment arrangements starting with the *Public Service Act 1902* (Cth) and then the *Public Service Act 1922* (Cth).[6] Importantly, the Australian Government's employment practices have closely followed the interventionist approach and the rationale of 'equity' and 'fairness' reflected in the broader economy's judicially based third party conciliation and arbitration system.[7] The *Public Service Act 1999* (Cth) was significant in that it reflected the modernising public administration reforms of the 1980s and 1990s devolving authority to those managing the resources of the Commonwealth to 'hire and fire' employees (or the more friendly 'recruitment and selection') according to their specific needs and arrangements in line with the private sector models.[8] The effect has been to change the framework of employment to a focus on the effectiveness in achieving a particular Agency's objective, and aligning the performance of the 'Public Service' more closely with that of the government of the moment.[9]

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[1] *Constitution* s 67. The legislative power of the Parliament follows according to the *Constitution* s 51(xxxvi).

[2] This also included the 'transfer' of those officers of departments transferred to the new Commonwealth: *Constitution* s 84.

[3] *Constitution* ss 62 and 63.

[4] Albeit the Parliament can fix the number of Ministers: *Constitution* s 65.

[5] See also Max Spry, 'Executive and High Court Appointments' in Geoffrey Lindell and Robert Bennett, *Parliament: The Vision in Hindsight* (2001) pp 424-434.

[6] For an historical analysis see Australian Public Service Commission, *A History in Three Acts: Evolution of the Public Service Act 1999*, Occasional Paper 3 (2004).

[7] See generally Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) pp 33-41.

[8] See, for examples, Australian National Audit Office Audit Report, *Managing People for Business Outcomes: Year Two, Across Agency*, Report No 50 (2003); Australian National Audit Office Audit Report, *Managing People for Business Outcomes*, Report No 61 (2002); Public Service and Merit Protection Commission, *Re-engineering People Management: From Good Intentions to Good Practice* (1997); Management Advisory Board and Management Improvement Advisory Committee, *Achieving Cost Effective Personnel Services*, MAB/MIAC Report No 18 (1995); and so on. Notably, the 'pendulum' on devolution or 'one APS' is not uniform and is constantly shifting: see, for example, Chris Aulich, Heba Batainah and Roger Wettenhall, 'Autonomy and Control in Australian Agencies: Data and Preliminary Findings from a Cross-national Empirical Study' (2010) 69 *Australian Journal of Public Administration* 214.

[9] There is a considerable literature on the desirability and success of public sector employment reforms: see, for example, Kathy MacDermott, *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service* (2008) and the references therein. See also Peter Boxall, 'How the Reforms Fit Together: An Australian Perspective' (1999) 88 *Canberra Bulletin of Public Administration* 117.

This chapter focuses on the *Public Service Act 1999* (Cth) and the employment framework established under this legislation. Most importantly, however, the *Public Service Act 1999* (Cth) also provides for an *Annual Report* obligation that completes the 'clear read' between the Budget, the spending and application of resources according to the financial arrangements and the Agency's subsequent performance.

8.2 Employment framework

In contrast to the earlier centralised models of employment, the *Public Service Act 1999* (Cth) transferred ('devolved') many of the employment decisions from central agencies to an 'Agency Head',[10] thus 'freeing APS agencies from central controls and enabling APS agencies to adopt employment arrangements which meet their particular needs'.[11] In effect 'devolution' was the transfer of managerial power (autonomy) from central agencies of government to the parts of government delivering the goods and services of government (the line agencies).[12] This matched the similar 'devolution' under the *Financial Management and Accountability Act 1997* (Cth) of the regulatory, accounting and accountability for Australian Government's expenditures to Agency Chief Executives.[13] The intention of these arrangements under the *Public Service Act 1999* (Cth), and the *Financial Management and Accountability Act 1997* (Cth),[14] was to improve Agency performance recognising that the employment arrangements (the terms and conditions of employment) needed to be suited to the particular Agency outcomes and outputs/programs.[15] The consequence of 'devolution' under the *Public Service Act 1999* (Cth) and under the *Financial Management and Accountability Act 1997* (Cth) has been to place accountability and responsibility for staffing, workplace relations, agency finances, agency assets and agency resources with the Agency Head/Chief Executive.[16] The result may not always have been positive:[17]

> Devolution increased the managerial and operational power exercised by departmental heads over public servants, but it also increased the power over departmental heads exercised by ministers and by the Prime Minister in particular: control over appointment and termination as well as performance assessment and pay. Within agencies, this has left employees increasingly exposed to the direction of senior managers, ministerial advisers and the ministers whom they serve.[18]

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[10] See *Public Service Act 1999* (Cth) ss 7 ('Agency Head'), 12 ('Agency Heads must promote APS Values'), 57 ('Responsibilities of Secretaries'), 66 ('Responsibilities of Heads of Executive Agencies'), and so on.

[11] Commonwealth, *Parliamentary Debates*, Senate, 14 October 1999, p 9680 (Chris Ellison, Special Minister of State); Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 1999, p 4684 (David Kemp, Minister Assisting the Prime Minister for the Public Service).

[12] This is to be distinguished from 'devolved' in the sense of 'the use by the public sector of the not-for-profit and/or the private sectors to deliver public goods and services': see Australian Public Service Commission, *Policy Implementation through Devolved Government*, Contemporary Government Challenges (2009) p 2.

[13] See *Financial Management and Accountability Act 1997* (Cth) s 44.

[14] See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8345 (John Fahey, Minister for Finance).

[15] Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) p 55.

[16] Despite the rhetoric of devolution, there remains the potential to retain control of various parts of government through partial devolution. In short, full devolution entailed transferring accountability and responsibility to the 'Agency Head' under both the *Public Service Act 1999* (Cth) and the 'Chief Executive' under the *Financial Management and Accountability Act 1997* (Cth). Partial devolution entailed transferring accountability and responsibility to either the 'Agency Head' under both the *Public Service Act 1999* (Cth) (an 'Executive Agency': *Public Service Act 1999* (Cth) s 65) or the 'Chief Executive' under the *Financial Management and Accountability Act 1997* (Cth) (a 'prescribed Agency': *Financial Management and Accountability Act 1997* (Cth) s 5; *Financial Management and Accountability Regulations 1997* (Cth) r 5(1) and sch 1) *but not both*. By controlling either staffing or resources there is some measure of control over the Agency. The example of IP Australia addressed in this chapter illustrates partial devolution. See also Charles Lawson, 'Managerialist Influences on Granting Patents in Australia' (2008) 15 *Australian Journal of Administrative Law* 70.

[17] See generally Kathy MacDermott, *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service* (2008) pp 69-85.

[18] Kathy MacDermott, *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service* (2008) p 69.

In recent times devolution has also been subject to the 'whole of government' reforms that emphasise 'the design and delivery of a wide variety of policies, programs and services that cross organisational boundaries':[19]

> Whole of government denotes public service agencies working across portfolio boundaries to achieve a shared goal and an integrated government response to particular issues. Approaches can be formal and informal. They can focus on policy development, program management and service delivery.[20]

The balance and the tension between 'devolution' and 'whole of government' (or 'connectivity', 'joined up government', and so on) is an ongoing project.[21] In the evolution of 'devolution', however, the *Workplace Relations Act 1996* (Cth) and the *Public Service Act 1999* (Cth)[22] both introduced reforms directed specifically at placing responsibility for employment arrangements at the workplace between employees and their immediate employers.[23] In the words of the then Minister for Industrial Relations, the *Workplace Relations Act 1996* (Cth) was intended to:

> … deliver the framework for structural reform of the labour market demanded by the imperatives of world competition and warranted by the legitimate expectation of Australians to enjoy improved living standards through higher employment and better paid jobs over time.[24]

The *Workplace Relations Act 1996* (Cth) established a process for agreement-making and details specific protection against unlawful termination, discrimination, and so on. The *Workplace Relations Act 1996* (Cth) also imposes the same industrial relations and employment arrangements for public servants as those applying to other workers. The effect was to devolve employment decision about setting remuneration and employment terms and conditions to the individual Agencies through Australian Workplace Agreements (AWAs) and Certified Agreements.[25] The amendments under the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) addressed the process of agreement-making to replace the terminology of 'AWAs', and the Australian Government developed an *Australian Government Employment Bargaining Framework* that maintains diversity of representation, genuine bargaining, terms and conditions set out in 'modern, flexible and streamlined instruments', Ministerial approval, within budget allocations and linked to productivity

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[19] Management Advisory Committee, *Connecting Government: Whole of Government Responses to Australia's Priority Challenges* (2004) p 3.

[20] Management Advisory Committee, *Connecting Government: Whole of Government Responses to Australia's Priority Challenges* (2004) pp 1 and 4.

[21] See Australian Public Service Commission, *State of the Service Report*, State of the Service Series 2008-09 (2009) pp xxv-xxvi. See also Advisory Group on Reform of Australian Government Administration, *Ahead of the Game: Blueprint for the Reform of Australian Government Administration* (2010); Australian Public Service Commission, *State of the Service Report*, State of the Service Series 2008-09 (2009); Advisory Group on Reform of Australian Government Administration, *Reform of Australian Government Administration: Building the World's Best Public Service*, Discussion Paper (2009); and so on. See generally Evert Lindquist, 'From Rhetoric to Blueprint: The Moran Review as a Concerted, Comprehensive and Emergent Strategy for Public Service Reform' (2010) 69 *Australian Journal of Public Administration* 115; Marilyn Pittard and Phillipa Weeks (eds), *Public Sector Employment in the Twenty-First Century* (2007).

[22] See Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 1999, pp 4683-4685 (David Kemp, Minister Assisting the Prime Minister for the Public Service). Notable an earlier Bill had been considered by the Joint Committee of Public Accounts that had recommended that the Bill be simplified, modernised and presented in a more accessible form: see Joint Committee of Public Accounts, *Advisory Report on the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997* (1997).

[23] See *Public Service Act 1999* (Cth) ss 8(1) ('This Act has effect subject to the *Workplace Relations Act 1996* [(Cth)]') and 20(1) ('An Agency Head, on behalf of the Commonwealth, has all the rights, duties and powers of an employer in respect of APS employees in the Agency'). See generally Peter Reith, *Towards a Best Practice Australian Public Service*, Discussion Paper (1996).

[24] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1996, p 1296 (Peter Reith, Minister for Industrial Relations). In addressing the *Public Service Act 1999* (Cth) the former Minister said the statute would 'promote higher performance in the APS by devolving management responsibility to individual agencies and, at the same time, ensure that public interest objectives are maintained through enhanced accountability': Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 1997, p 6461 (Peter Reith, Minister for Industrial Relations).

[25] Although this was not without some limits. See, for example, Australian Public Service Commission, *Policy Parameters for Agreement Making in the APS* (2006).

gains (or 'genuine quantifiable productivity initiatives').[26] The *Public Service Act 1999* (Cth) was also amended by the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cth) to replace references to the *Workplace Relations Act 1996* (Cth) with reference to the *Fair Work Act 2009* (Cth),[27] thereby subjecting those employed under the *Public Service Act 1999* (Cth) to the process for agreement-making through Enterprise Bargaining and safety net of minimum employment conditions set out in the *Fair Work Act 2009* (Cth).[28] The modes of employment under the *Public Service Act 1999* (Cth) scheme[29] involve a classification[30] of the 'Senior Executive Service' (or SES)[31] as a subset of 'APS employees',[32] the former SES being subject to specific rules about engagement, promotion, redeployment, mobility and termination.[33] The 'APS employees' (including the SES) may now be employed on terms and conditions according to an Enterprise Agreement,[34] a unilateral contract (or 'determination'),[35] or an individual common law employment contract.[36] In the context of public sector employment the current Australian Government's policy is to:

- ensure fairness and flexibility;
- promote productivity;
- provide for sustainable and affordable remuneration arrangements;
- provide for enterprise agreements, negotiated at the individual Agency level, as the principal means of setting terms and conditions of employment for non-Senior Executive Service level employees; and
- enshrine accountability for compliance with the Bargaining Framework with individual Agencies and the relevant Portfolio Minister.[37]

The *Public Service Act 1999* (Cth) essentially provides the basic framework for the structure, responsibilities and management of the Australian Public Service (APS).[38] The major advances brought about by the *Public Service Act 1999* (Cth)[39] were a declaration of 'APS Values' (reflecting public expectations of the relationship between the public service and the government, the Parliament and the Australian community),[40] a 'Code of Conduct' (reflecting the public expectation that public servants will exercise appropriate conduct),[41] and the devolution to 'Agency Heads' of all the rights, duties and powers of an employer in respect of their APS employees,[42] subject to the *Fair Work Act 2009* (Cth).[43] Under the *Public Service Act 1999* (Cth) there is a statutory office of Public

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[26] Australian Government, *Australian Government Employment Bargaining Framework* (2008). See also Department of Education, Employment and Workplace Relations, *Australian Government Employment: Bargaining Framework Supporting Guidance* (2008) pp 1 and

[27] *Fair Work (State Referral and Consequential and Other Amendments) Act* 2009 (Cth) s 3 and sch 16 (item 18).

[28] See Commonwealth, *Parliamentary Debates*, Senate, 4 December 2008, pp 8355-8362 (Joe Ludwig, Minister for Human Services); Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, pp 11189-11197 (Julia Gillard, Acting Prime Minister).

[29] This includes: *Public Service Act 1999* (Cth), *Public Service Regulations 1999* (Cth), *Public Service Commissioner's Directions 1999* (Cth), *Prime Minister's Public Service Directions 1999* (Cth) and the *Public Service Classification Rules 2000* (Cth).

[30] See *Public Service Act 1999* (Cth) s 23(1); *Public Service Classification Rules 2000* (Cth) r 5.

[31] *Public Service Act 1999* (Cth) ss 7 ('SES employee') and 34; *Public Service Classification Rules 2000* (Cth) r 8; *Public Service Commissioner's Directions 1999* (Cth) dd 6.6-6.6B.

[32] *Public Service Act 1999* (Cth) ss 7 ('APS employee') and 22; *Public Service Classification Rules 2000* (Cth) r 6.

[33] See *Public Service Act 1999* (Cth) s 36; *Public Service Commissioner's Directions 1999* (Cth) dd 6.1-6.8.

[34] *Public Service Act 1999* (Cth) ss 22 and 72. See also *Fair Work Act 2009* (Cth) s 172.

[35] *Public Service Act 1999* (Cth) s 24(1).

[36] *Public Service Act 1999* (Cth) s 22.

[37] Department of Education, Employment and Workplace Relations, *Australian Government Employment Bargaining Framework: Supporting Guidance* (2009) p 3.

[38] The APS consisting of Agency Heads and APS employees: *Public Service Act 1999* (Cth) s 9.

[39] For an historical overview see Australian Public Service Commission, *A History in Three Acts: Evolution of the Public Service Act 1999* (2004). See also Public Service and Merit Protection Commission and the Department of Industrial Relations, *The Public Service Act 1997: Accountability in a Devolved Management Framework* (1997) pp 4-8.

[40] *Public Service Act 1999* (Cth) s 10. See also *Public Service Commissioner's Directions 1999* (Cth) d 2.1-4.7.

[41] *Public Service Act 1999* (Cth) s 13. See also *Public Service Commissioner's Directions 1999* (Cth) d 5.1-5.6.

[42] See *Public Service Act 1999* (Cth) ss 20, 22 and 24(1). See also Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) pp 33-37.

[43] *Public Service Act 1999* (Cth) s 8(1).

Service Commissioner[44] with various function addressing APS employment,[45] including promoting the APS Values and the Code of Conduct.[46] The Public Service Commissioner must also issue directions about APS Values,[47] the Code of Conduct,[48] and various other matters.[49] Further, the Prime Minister may issue general directions to Agency Heads about the management and leadership of APS employees.[50] The people management approach to devolution under the *Workplace Relations Act 1996* (Cth) (and retained under the *Fair Work Act 2009* (Cth)) and the *Public Service Act 1999* (Cth) was also balanced with 'enhanced accountability for Agency performance'[51] that included an annual reporting obligation.[52] The significance of the *Public Service Act 1999* (Cth) was:

- For the first time it contains a declaration of APS values, reflecting public expectations of the relationship between the public service and the government, the Parliament and the Australian community, with specific reference to political impartiality, maintenance of the highest ethical standards, accountability for actions, and responsibilities to the government of the day ….
- A legally enforceable code of conduct is articulated, setting out the standards of behaviour expected of those working in the public service.
- Specific provisions are included affirming the merit principle, prohibiting patronage and favouritism, and affording protection for public interest whistleblowing by APS staff.
- Staffing powers previously assigned to the Public Service Commissioner and delegated to the heads of public service agencies, are fully devolved to them. They are thus afforded all the rights, duties and powers of an employer in respect of their APS employees, with authority to engage, terminate and determine their employment terms and conditions.
- An APS employee is entitled to seek a review of any action affecting their employment.
- An office of Merit Protection Commissioner has been established with independent review and inquiry powers.[53]

Other employment conditions are mandated in a range of other legislative instruments, including:[54]

(a) *Long service leave* – The *Long Service Leave (Commonwealth Employees) Act 1976* (Cth) provides for accrued entitled to paid leave based on the length of time of service, with an entitlement accruing after a specified time.[55]

(b) *Maternity leave* – The *Maternity Leave (Commonwealth Employees) Act 1973* (Cth) provides for a period of leave for maternity.[56]

(c) *Work-related injury rehabilitation and compensation* – The *Safety, Rehabilitation and Compensation Act 1988* (Cth) provides for compensation and rehabilitation as a result of workplace injuries and diseases causing 'death, incapacity for work, or impairment'.[57]

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[44] *Public Service Act 1999* (Cth) s 40(1).
[45] See *Public Service Act 1999* (Cth) s 41(1).
[46] *Public Service Act 1999* (Cth) s 41(1)(e). See also Australian Public Service Commission, *State of the Service Report*, State of the Service Series 2005-06 (2006) pp 56-69.
[47] *Public Service Act 1999* (Cth) s 11. See also *Public Service Commissioner's Directions 1999* (Cth) d 2.1-4.7.
[48] *Public Service Act 1999* (Cth) s 15(4). See also *Public Service Commissioner's Directions 1999* (Cth) d 5.1-5.6.
[49] *Public Service Act 1999* (Cth) s 36 (senior executive employment). See also *Public Service Commissioner's Directions 1999* (Cth) dd 6.1-6.8 (senior executive employment).
[50] *Public Service Act 1999* (Cth) s 21(1). See *Prime Minister's Public Service Directions 1999* (Cth).
[51] Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) p 55.
[52] *Public Service Act 1999* (Cth) ss 63(1) and (2). See also Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010).
[53] Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) pp 35-36.
[54] See also Australian Public Service Commission, *Conditions of Engagement* (2009).
[55] *Long Service Leave (Commonwealth Employees) Act 1976* (Cth) ss 16 and 17.
[56] *Maternity Leave (Commonwealth Employees) Act 1973* (Cth) s 6.
[57] *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 14.

(d) *Occupational health and safety provisions* – The *Occupational Health and Safety Act 1991* (Cth) provides for the employer to 'take all reasonably practicable steps to protect the health and safety at work of the employer's employees'.[58]

(e) *Human rights protections* – These include protections against basic recognised rights in the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and the *Human Rights and Equal Opportunity Act 1986* (Cth).

A number of other significant 'modernising' changes were expressly recognised by the *Public Service Act 1999* (Cth). These are considered next.

8.2.1 Accountability

The *Public Service Act 1999* (Cth) expressly provides that 'the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public'.[59] For an APS employee this means:

> APS employees work within an accountability framework comprising a continuum of accountability relationships:
> - Governments are accountable to the Australian people at elections;
> - Ministers are responsible for the overall administration of their portfolios and accountable to the Parliament for the exercise of Ministerial authority;
> - public servants are accountable to Ministers for the exercise of delegated authority and through them to the Parliament;
> - public servants are also accountable for their performance through agency management systems.
>
> Public servants must also conform with the law, and may be held to account through the legal system (footnotes omitted).[60]

The means of accountability include obligations to the portfolio Minister,[61] the Finance Minister,[62] to the Parliament,[63] and to the general law.[64] The significant advance under the *Public Service Act 1999* (Cth) was to impose an *Annual Report* obligation that provided a 'clear read' between the Budget and Agency's subsequent performance (considered further below).[65] A further aspect of accountability includes evolving conceptions of 'values', 'ethics' and 'integrity'.[66]

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[58] *Occupational Health and Safety Act 1991* (Cth) s 16.

[59] *Public Service Act 1999* (Cth) s 10(1)(e).

[60] Australian Public Service Commission, *APS Values and Code of Conduct in Practice* (2009) p 14.

[61] See *Public Service Act 1999* (Cth) ss 57 (responsibilities of Secretaries) and 66 (responsibilities of Heads of Executive Agencies). See also Australian Public Service Commission, *Supporting Ministers, Upholding the Values: A Good Practice Guide* (2006); Australian National Audit Office, *Managing Parliamentary Workflow: Better Practice Guide* (2003).

[62] *Financial Management and Accountability Act 1997* (Cth) ss 48 (accounts and records of the Agency) and 50 (financial statements).

[63] This includes the provision of data and information to Senators and Members, appearance at Committees, and various reporting obligations. See Department of the Prime Minister and Cabinet, *Guidelines for the Presentation of Documents to the Parliament (including Government Documents, Government Responses to Committee Reports, Ministerial Statements, Annual Reports and Other Instruments)* (2010); Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (1989).

[64] In particular this includes the criminal sanctions: see, for examples, *Public Service Act 1999* (Cth) s 79(2)(c).

[65] *Public Service Act 1999* (Cth) ss 44(1) (Public Service Commissioner), 63(1) (Secretary of a Department), 70(1) (Head of an Executive Agency). See also Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010) p 3; Andrew Murray, *Review of Operation Sunlight: Overhauling Budget Transparency* (2008) pp 90-91; Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (2007) pp 77-83; Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Better Practice Guide (2002) pp 5-6; and so on.

[66] See Australian Public Service Commission, *Reinvigorating the Westminster Tradition: Integrity and Accountability in Relations between the Australian Government and the APS* (2009) pp 4-5; Advisory Group on Reform of Australian Government Administration, *Reform of Australian Government Administration: Building the World's Best Public Service*, Discussion Paper (2009) pp 13-19. See also Australian Public Service Commission, *Delivering Performance and Accountability*, Contemporary Government Challenges (2009).

8.2.2 Responsiveness

The *Public Service Act 1999* (Cth) expressly recognises that 'the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs'.[67] For an APS employee this means:

> Responsive APS employees:
> - are knowledgeable about the Government's stated policies;
> - are sensitive to the intent and direction of policy;
> - take a whole-of-government view;
> - are well informed about the issues involved;
> - draw on professional knowledge and expertise and are alert to best practice;
> - consult relevant stakeholders and understand their different perspectives;
> - provide practical and realistic options and assess their costs, benefits and consequences;
> - convey advice clearly and succinctly;
> - carry out decisions and implement programmes promptly, conscientiously, efficiently and effectively.[68]

More specifically, in dealing with Ministers of the Australian Government:

> Responsive implementation of the Government's policies and programmes … is achieved through a close and cooperative relationship with Ministers and their employees. Ministers may make decisions, and issue policy guidelines with which decisions made by APS employees must comply. Such Ministerial decisions and policy guidance must, of course, comply with the law and decisions by APS employees must meet their responsibilities for impartiality and efficient, effective and ethical use of resources (footnote omitted).[69]

The effect of the reforms has been to engender a high level of responsiveness to government in the APS,[70] albeit there might have been some adverse consequences for public administration.[71] Perhaps unsurprisingly, 'responsiveness' is a complex conception and open to significant flexibility.[72]

8.2.3 The public interest

The *Public Service Act 1999* (Cth) recognises, albeit not expressly stated, that it is 'the government and its Ministers [that] determine the public interest in terms of policies and program priorities, and public servants, within the requirements of the legal framework, advise on and implement their decisions',[73] where the 'public service has particular responsibility for the public interest in upholding the law and ensuring due process'.[74] Thus:

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[67] *Public Service Act 1999* (Cth) s 10(1)(f).

[68] Australian Public Service Commission, *APS Values and Code of Conduct in Practice* (2009) p 12. See also Australian National Audit Office, *Some Better Practice Principles for Developing Policy Advice* (2001) p i ('…any proposals and advice need to recognise the sensitivity of both being responsive to government objectives and fully informing the minister(s) concerned in a professional manner'); Australian National Audit Office, *Developing Policy Advice*, Audit Report No 21 2001-02 (2002) p 30 ('… any proposals and advice need to recognise the sensitivity of both being responsive to government objectives and fully informing the ministers concerned in a professional manner').

[69] Australian Public Service Commission, *APS Values and Code of Conduct in Practice* (2009) p 12.

[70] See Advisory Group on Reform of Australian Government Administration, *Benchmarking Australian Government Administration Performance* (2009) pp 70-73.

[71] The concern, however, is that with the result of reforms introducing new disciplines to the public service emphasising responsiveness to the Government 'have been ratcheted up to the point where responsiveness tips into complicity': Kathy MacDermott, *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service* (2008) p 2

[72] For an analysis of this flexibility, especially in the face of contestability: see Kathy MacDermott, *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service* (2008) pp 35-40. See also Geoffrey Barker, 'The Public Service' in Clive Hamilton and Sarah Maddison (eds), *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* (2007).

[73] Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) p 37.

[74] Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) p 166.

> The legislation has been framed to provide an inter-locking system of powers and responsibilities, integrated within a departmental management framework. It provides a model of accountability in which the public interest is clearly articulated.[75]

In this context the 'public interest' is a theme that runs through the legislated APS Values (discussed below) in employment being apolitical and professional,[76] merit based,[77] ethical,[78] accountable 'within the framework of Ministerial responsibility',[79] and responsive to government.[80] The important point is that 'public interest' has a specific meaning in APS employment that is tied to the APS Values: 'The APS Values describe the unique public interest features of the APS, the attributes that, collectively, differentiate it from other enterprises'.[81] The APS Values are considered in detail below (¶8.4).

8.3 Promoting 'performance'

The purpose of the outcomes and outputs/programs framework, introduced in the Federal Budget 1999 and coinciding with the adoption of the accrual budgeting framework in the *Financial Management Legislation Amendment Act 1999* (Cth),[82] was to impose 'a means of structuring corporate governance and management arrangements and reporting on planned and actual performance' taking into account that 'agencies and their ministers have considerable scope for adopting specific structures and arrangements that suit their circumstances':[83]

> Alignment of an agency's organisational structure with outcomes, outputs and administered items best defines management accountabilities and responsibilities and enables agencies to directly translate internal reporting to external reporting.[84]

At its heart was the imperative to establish performance benchmarks based on performance indicators of efficiency of Agency operations and cost effectiveness of the outputs/programs delivered:[85]

> … performance indicators are developed to allow scrutiny of effectiveness (ie the impact of the outputs and administered items on outcomes) and efficiency (especially in terms of the application of administered items and the price, quality and quantity of outputs) and to enable the system to be further developed to improve performance and accountability for results.[86]

Put within the context of employment under the *Public Service Act 1999* (Cth) and the broader framework:

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[75] Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) p 37.
[76] *Public Service Act 1999* (Cth) s 10(1)(a).
[77] *Public Service Act 1999* (Cth) s 10(1)(b).
[78] *Public Service Act 1999* (Cth) s 10(1)(d).
[79] *Public Service Act 1999* (Cth) s 10(1)(e).
[80] *Public Service Act 1999* (Cth) s 10(1)(f); Australian Public Service Commission, *Values in the Australian Public Service* (2nd ed, 2002) p viii.
[81] Australian Public Service Commission, *Values in the Australian Public Service* (2nd ed, 2002) p viii.
[82] See Department of Finance and Administration, *Agency Resourcing 1999-2000*, Budget Paper No 4 (1999) pp 1-2. See also Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (2007) pp 37-41. See also Michael Vertigan, *Review of Budget Estimates Production Arrangements* (1999); Rose Verspaandonk, *Accrual Budgeting-State of Play*, Parliamentary Library Research Note 30 (2000); Peter Boxall, 'How the Reforms Fit Together: An Australian Perspective' (1999) *Canberra Bulletin of Public Administration* 117.
[83] Department of Finance and Administration, *The Outcomes & Outputs Framework: Guidance Document* (2000) p 4. See Senate Finance and Public Administration Legislation Committee, *The Format of the Portfolio Budget Statements: Third Report* (2000) p 10. See also Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (2007) pp 52-53.
[84] Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (2007) p 52.
[85] See also Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (2007) p 38; Australian National Audit Office, *Annual Performance Reporting*, Audit Report No 11 (2003) pp 27-35.
[86] Department of Finance and Administration, *The Outcomes & Outputs Framework: Guidance Document* (2000) p 5.

> The legislative framework does not set out how performance management is to be implemented in individual agencies but each agency is now expected to:
> - have the organisational capacity, flexibility and responsiveness necessary to achieve the outcomes expected
> - have a culture of achievement, planning time and priorities to deliver on intended results
> - report on the effectiveness of the agency's outputs
> - demonstrate that resource priorities match agreed outcomes
> - have a fair and open performance management system that covers all APS employees, guides salary movement, is linked to organisational and business goals and the maintenance of the [APS] Values, and provides each employee with a clear statement of performance expectations and an opportunity to comment on those expectations.[87]

This might be applied according to 'factors':

> … the factors that will assist organisations in designing, implementing and reviewing their performance management systems. The success factors for performance management systems are summarised as:
> - *Alignment* – within a values-based framework that takes account of the organisational culture and business objectives;
> - *Credibility* – applying across the organisation, and seen as fair, transparent and rigorous; and
> - *Integration* – integrating organisational objectives with the performance of teams and individuals.[88]

Thus:

> Many agencies are now focusing on improving their performance management to integrate it with their business and workforce planning by:
> - clarifying performance objectives and linking individual and business plans with organisational plans
> - periodic performance appraisal of individual and team performance against achievements and behaviours linked to the Values
> - recognising and rewarding performance
> - counselling and effectively managing poor performance
> - learning and development to build individual and organisational capability
> - evaluating the contribution of individual and organisational performance.[89]

Despite the apparent changes following the move from the *Workplace Relations Act 1996* (Cth) (that devolved employment decision about setting remuneration and employment terms and conditions to the individual agencies through AWAs and Certified Agreements) to the *Fair Work Act 2009* (Cth) (that sets out a process of agreement-making through Enterprise Bargaining and a safety net of minimum employment conditions), the issues of performance remains unchanged,[90] although how performance is measured is evolving.[91]

8.4 APS Values

The 'APS Values' are another incident of 'devolution' intended 'to facilitate a more responsive, flexible and performance-focused' public service.[92] The *Public Service Act 1999* (Cth) provides that the 'APS Values' are as follows:

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[87] Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) p 66.
[88] Management Advisory Committee, *Performance Management in the APS: A Strategic Framework* (2001) p 5. See also Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) p 66.
[89] Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (2003) p 67.
[90] See, for example, Advisory Group on Reform of Australian Government Administration, *Ahead of the Game: Blueprint for the Reform of Australian Government Administration* (2010) pp 45-46 (driving performance through revised APS Values) and 57-62 (develop performance management processes need to build a high performance culture).
[91] See, for examples, Advisory Group on Reform of Australian Government Administration, *Reform of Australian Government Administration: Building the World's Best Public Service* (2009) pp 13-16, 20-24 and 28-31; Advisory Group on Reform of Australian Government Administration, *Benchmarking Australian Government Administration Performance* (2009) pp 22-24; Australian Public Service Commission, *Delivering Performance and Accountability*, Contemporary Government Challenges (2009) pp 33-40. See also Australian Public Service Commission, *Agency Health: Monitoring Agency Health and Improving Performance*, Contemporary Government Challenges (2007).
[92] Australian Public Service Commission, *APS Values and Code of Conduct in Practice* (2009) p 1.

(a) the APS is apolitical, performing its functions in an impartial and professional manner;
(b) the APS is a public service in which employment decisions are based on merit;
(c) the APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves;
(d) the APS has the highest ethical standards;
(e) the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;
(f) the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;
(g) the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;
(h) the APS has leadership of the highest quality;
(i) the APS establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace;
(j) the APS provides a fair, flexible, safe and rewarding workplace;
(k) the APS focuses on achieving results and managing performance;
(l) the APS promotes equity in employment;
(m) the APS provides a reasonable opportunity to all eligible members of the community to apply for APS employment;
(n) the APS is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government;
(o) the APS provides a fair system of review of decisions taken in respect of APS employees.[93]

An 'Agency Head' is required to 'uphold and promote the APS Values'.[94] The 'Agency Head' must also 'establish procedures for determining whether an APS employee in the Agency has breached the Code of Conduct'[95] where a part of that code includes that an 'APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS'.[96] The APS Commissioner may issue Directions to promote the APS Values and determine their scope or application.[97] The APS Values apply to those employed under the *Public Service Act 1999* (Cth) in the performance of their employment:[98]

> APS employees must identify what the Values mean in practical terms within the context of their organisation and must work together to ensure that these Values are embedded in their agency's culture.[99]

The APS Values specifically address the relationships between the Australian Government and the Parliament on the performance of employees working under the *Public Service Act 1999* (Cth):[100]

(a) The APS is apolitical, performing its functions in an impartial and professional manner – *Public Service Act 1999* (Cth) s 10(1)(a):

The *Public Service Commissioner's Directions 1999* (Cth) provide:

> (1) In upholding and promoting the APS Value mentioned in paragraph 10(1)(a) of the Act, an Agency Head must put in place measures in the Agency directed at ensuring that:
> (a) management and staffing decisions in the Agency are made on a basis that is independent from the political party system, political bias and political influence; and
> (b) the same high standard of policy advice and implementation, and the same high quality professional support, is provided to the elected Government, irrespective of which political party is in power and irrespective of the Agency Head's political beliefs.

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[93] *Public Service Act 1999* (Cth) ss 7 and 10(1).
[94] *Public Service Act 1999* (Cth) s 12.
[95] *Public Service Act 1999* (Cth) s 15(3).
[96] *Public Service Act 1999* (Cth) s 13(11).
[97] *Public Service Act 1999* (Cth) s 11; *Public Service Commissioner's Directions 1999* (Cth).
[98] *Public Service Act 1999* (Cth) ss 15(1) and 42(2).
[99] Australian Public Service Commission, *Values in the Australian Public Service* (2nd ed, 2002) p vii.
[100] *Public Service Act 1999* (Cth) ss 10(1)(a), (e) and (f). See also Australian Public Service Commission, *APS Values and Code of Conduct in Practice: Guide to Official Conduct for APS Employees and Agency Heads* (2003) pp 20-26. See generally Australian Public Service Commission, *Embedding APS Values* (2003).

(2) In upholding the APS Value mentioned in paragraph 10(1)(a) of the Act, an APS employee must, taking into account the employee's duties and responsibilities in the Agency, help to ensure that:
  (a) management and staffing decisions in the Agency are made on a basis that is independent from the political party system, political bias and political influence; and
  (b) the same high standard of policy advice and implementation, and the same high quality professional support, is provided to the elected Government, irrespective of which political party is in power and irrespective of the employee's political beliefs.[101]

In articulating what this Direction might mean the Australian Public Service Commission has provided:

> One of the primary roles of the APS is to advise on and give effect to the policies of the government of the day. In doing so it must fulfil its functions in a way that is effective and efficient and consistent with the law. This Value requires the APS to be managed and staffed on a basis that is independent of the political party system and political bias and influence. It also requires APS employees to provide the same high standard of service to the elected government, irrespective of which political party is in power and irrespective of their own political beliefs.
>
> For Agency Heads and APS employees, the practical application of the Value and its Direction means that:
> - there is a clear prohibition on patronage and favouritism
> - agencies are committed to excellence and staff demonstrate a high degree of professionalism
> - advice is impartial, relevant and useful to Ministers and the government of the day
> - legislation is implemented in a non-partisan way and the policies of the government of the day are administered impartially.[102]

(b) The APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public – *Public Service Act 1999* (Cth) s 10(1)(e):

The *Public Service Commissioner's Directions 1999* (Cth) provide:

(1) In upholding and promoting the APS Value mentioned in paragraph 10(1)(e) of the Act, an Agency Head must take all reasonable steps to ensure that he or she:
  (a) understands the accountability framework within which he or she operates; and
  (b) meets individual and Agency statutory and reporting obligations; and
  (c) is able, within the accountability framework, to demonstrate clearly and appropriately to Ministers, to the Parliament and to other stakeholders that he or she has efficiently, effectively and ethically used the resources allocated to him or her.

(2) In upholding the APS Value mentioned in paragraph 10(1)(e) of the Act, an APS employee must, taking into account the employee's duties and responsibilities in the Agency, take all reasonable steps to ensure that he or she:
  (a) understands the accountability framework within which he or she operates; and
  (b) meets individual and Agency statutory and reporting obligations; and
  (c) is able, within the accountability framework, to demonstrate clearly and appropriately to Ministers, to the Parliament and to other stakeholders that he or she has efficiently, effectively and ethically used the resources allocated to him or her.[103]

In articulating what this Direction might mean the Australian Public Service Commission has provided:

> Ministers are accountable to Parliament for the effectiveness of their portfolios, but for operational efficiency they must be able to delegate substantial powers to staff in APS agencies. APS staff are accountable for the way in which they administer government policies. Ministers must therefore be able to have confidence in the performance of the APS and must also be able to account to Parliament, and through it to the public, for actions undertaken by the APS on the Government's behalf …

[101] *Public Service Commissioner's Directions 1999* (Cth) d 2.2.
[102] Australian Public Service Commission, *Values in the Australian Public Service* (2nd ed, 2002) pp 1-2.
[103] *Public Service Commissioner's Directions 1999* (Cth) d 2.6.

For Agency Heads and APS employees, the practical application of the Value and its Direction means that:

- agencies must meet their statutory and administrative reporting obligations
- agencies are able to account for the effective, efficient and ethical use of resources provided to deliver programs
- staff understand the accountability framework in which they operate
- agencies are able to provide timely, regular and comprehensive information and other support to Ministers to help them meet their accountability obligations to Parliament and the public
- agencies maintain efficient and effective management systems, including goal setting and high quality performance management
- agencies are able to account effectively to review bodies for the administration of government policies and utilisation of public resources.[104]

(c) The APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs – *Public Service Act 1999* (Cth) s 10(1)(f):

The *Public Service Commissioner's Directions 1999* (Cth) provide:

> (1) In upholding and promoting the APS Value mentioned in paragraph 10(1)(f) of the Act, an Agency Head must put in place measures in the Agency directed at ensuring that:
> (a) advice provided to the Government:
> (i) is frank, honest, comprehensive, accurate and timely; and
> (ii) taking into account resource and time constraints, is based on a full understanding of all relevant issues and options, the Government's objectives and the environment in which it operates; and
> (b) Government decisions are implemented professionally and with integrity, irrespective of the nature of any advice that may have been provided to the Government at an earlier time.
> (2) In upholding the APS Value mentioned in paragraph 10(1)(f) of the Act, an APS employee must, taking into account the employee's duties and responsibilities in the Agency, help to ensure that:
> (a) advice provided to the Government:
> (i) is frank, honest, comprehensive, accurate and timely; and
> (ii) taking into account resource and time constraints, is based on a full understanding of all relevant issues and options, the Government's objectives and the environment in which it operates; and
> (b) Government decisions are implemented professionally and with integrity, irrespective of the nature of any advice that may have been provided to the Government at an earlier time.[105]

In articulating what this Direction might mean the Australian Public Service Commission has provided:

> The APS has a responsibility to advise and assist the government of the day in implementing the law and in developing and applying the government's policies and programs. This Value, which complements the apolitical service Value, will ensure that governments have a comprehensive view of issues and access to a full range of options on which to make decisions.
>
> For Agency Heads and APS employees, the practical application of the Value and its Direction means that:
>
> - agencies understand the government's objectives and the environment in which it operates and are able to anticipate, devise and provide options to meet these objectives
> - agencies monitor, and keep the government briefed on, the range of developments and contingencies which might affect policy decisions
> - agencies are responsible for implementing government decisions professionally and with integrity, irrespective of the nature of the advice that they might earlier have given
> - agencies' advice is frank, honest, comprehensive, accurate, timely and forward–looking, taking into account best practice here and overseas.[106]

[104] Australian Public Service Commission, *Values in the Australian Public Service* (2nd ed, 2002) pp 9-10.
[105] *Public Service Commissioner's Directions 1999* (Cth) d 2.7.
[106] Australian Public Service Commission, *Values in the Australian Public Service* (2nd ed, 2002) pp 1-2.

Despite these Directions and the apparent apolitical imperative of the APS Values, the Australian Public Service Commission has also clearly provided that:

> Ministers and governments as the elected representatives of the Australian people determine and define the public interest. Public servants advise and implement – assisting governments to deliver their policy agenda and priorities. They share an objective of achieving better outcomes for the Australian community … The APS works within, and to implement, the elected government's policies and outcomes. While it is not independent, it is well placed to draw on a depth of knowledge and experience including longer-term perspectives.[107]

The increasing interaction between public servants and Minister's offices for advice[108] shows that managing this APS Value is constantly in issue.[109] Perhaps of more concern, however, is the potential that 'responsiveness' might undermine the integrity of the valued frank, honest, comprehensive, accurate and timely advice.[110]

8.5 Reporting obligations and the 'clear read'

Perhaps the most significant contribution of the *Public Service Act 1999* (Cth) to accountability, responsiveness and transparency has been its mandatory reporting obligations.[111] There are a number of reporting obligations, including:

(a) *Annual Reports* – The *Public Service Act 1999* (Cth) requires that '[a]fter the end of each financial year', the Secretary of a Department and the Head of an Executive Agency 'must give a report to the Agency Minister, for presentation to the Parliament, on the Department's activities during the year'.[112] These *Annual Reports* detail the activities of the Agency during the financial year according to the appropriated outputs/programs.

(b) *State of the Service* report – The *Public Service Act 1999* (Cth) and *Public Service Commissioner's Directions 1999* (Cth) require the annual presentation of the *State of the Service* report (and tabled in Parliament) as a part of the *Annual Report* of the Australian Public Service Commission.[113] This addresses some of the activities and human resource management practices during the financial year, including survey results of employees and Agencies.[114] The *State of the Service* report is accompanied by a number of other reports, such as the *State of the Service at a Glance*, *State of the Service Employee Survey Results*, the *Australian Public Service Statistical Bulletin*, and so on.[115]

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[107] Australian Public Service Commission, *APS Values and Code of Conduct in Practice: Guide to Official Conduct for APS Employees and Agency Heads* (2003) p 20.

[108] The Australian Public Service Commission noting: 'Just under half (44%) of relevant APS 1-6 employees who had been in direct contact with Ministers and/or their advisers in the last 12 months had done so in relation to the provision of advice (compared to 62% of relevant EL employees and 81% of relevant SES employees). This finding is consistent with that of last year': Australian Public Service Commission, *State of the Service Report*, State of the Service Series 2004-05 (2005) p 36.

[109] See generally Australian Public Service Commission, *APS Values and Code of Conduct in Practice* (2009).

[110] See Kathy MacDermott, *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service* (2008) pp 35-40.

[111] See *Public Service Act 1999* (Cth) ss 63 (Secretary of a Department) and 70 (Head of an Executive Agency).

[112] *Public Service Act 1999* (Cth) ss 63 (Secretary of a Department) and 70 (Head of an Executive Agency).

[113] *Public Service Act 1999* (Cth) s 44; *Public Service Commissioner's Directions 1999* (Cth) cl 3.5(2). Notably the Joint Committee of Public Accounts and Audit agreed extend the tabling deadline of the *State of the Service Report* to one calendar month after the tabling date for the Australian Public Service Commission *Annual Report*: see Australian Public Service Commission, *State of the Service Report*, State of the Service Series 2003-04 (2004) p iii.

[114] See, for examples, Australian Public Service Commission, *State of the Service Report*, State of the Service Series 2009-10 (2010); Australian Public Service Commission, *State of the Service Report*, State of the Service Series 2008-09 (2009); Australian Public Service Commission, *State of the Service Report*, State of the Service Series 2007-08 (2008); and so on.

[115] See, for examples, Australian Public Service Commission, *State of the Service 2008-09 at a Glance* (2009); Australian Public Service Commission, *State of the Service Employee Survey Results 2008-09* (2009); Australian Public Service Commission, *Australian Public Service Statistical Bulletin 2008-09* (2009); and so on.

The intention of the *Annual Report* reporting obligations is to enhance accountability, responsibility and transparency through a 'clear read' between the Budget documents and the subsequent reporting obligations.[116] The *Annual Report* itself is a report from a *Public Service Act 1999* (Cth) 'Agency Head' to the portfolio Minister for tabling in the Parliament about that Agency's performance.[117] Included in the *Annual Report* are the *Financial Management and Accountability Act 1997* (Cth) requirements that the 'Chief Executive' prepare annual financial statements (according to the *Finance Minister's Orders*),[118] and the associated Auditor-General's report.[119] A similar requirement applies to bodies under the *Commonwealth Authorities and Companies Act 1997* (Cth).[120] In effect, the *Annual Report* is the 'key reference document'[121] that links the financial management and people management arrangements within an outcomes and outputs/programs framework set out in the *Portfolio Budget Statements* (and *Portfolio Additional Estimates Statements*) accompanying the Budget appropriations.[122]

The *Annual Report* is tabled in Parliament[123] and referred to a Senate Standing Committee[124] and a House of Representative Standing Committee.[125] These committees have the mandate to rigorously assess the *Annual Report*.[126] Other opportunities for Parliamentary scrutiny of the Australian Government's operations, activities and expenditure proposals occurs through the JCPAA under the *Public Accounts and Audit Committee Act 1951* (Cth) and the twice yearly Senate Estimate Committee hearings.[127]

The following analysis demonstrates the accountability, responsibility and transparency through a 'clear read' between the Budget documents and the subsequent reporting obligations for IP Australia:[128] (1) in the formal reporting periods from the 2006 Budget[129] to the 2006-2007 *Annual Report*[130] that covers the period of the 2006 Budget allocation (Tables 8.1 and 8.2); (2) in the formal

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116 See Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010) p 3; Andrew Murray, *Review of Operation Sunlight: Overhauling Budget Transparency* (2008) pp 90-91; Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (2007) pp 77-83; Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Better Practice Guide (2002) pp 5-6; and so on. For an illustration of the relationship see, for example, Charles Lawson, 'Managerialist Influences on Granting Patents in Australia' (2008) 15 *Australian Journal of Administrative Law* 70.

117 *Public Service Act 1999* (Cth) ss 44(1) (Public Service Commissioner), 63(1) (Secretary of a Department), 70(1) (Head of an Executive Agency).

118 *Financial Management and Accountability Act 1997* (Cth) s 63; amended *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2009* (Cth).

119 *Financial Management and Accountability Act 1997* (Cth) ss 49-51 and 54-57.

120 See *Commonwealth Authorities and Companies Act 1997* (Cth) ss 9(1) and sch 1 (item 1) (*Annual Report* – Commonwealth authorities), 36 (*Annual Report* – Commonwealth companies).

121 Australian National Audit Office, *Annual Performance Reporting*, Audit Report No 11 (2003) p 21. See also *Senate Standing Order* 25(21); Australian National Audit Office and Department of Finance and Administration, *Guide on Annual Performance Reporting*, Better Practice Guide (2004).

122 See Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Better Practice Guide (2002) p 5. See also Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010) pp 3-4.

123 *Public Service Act 1999* (Cth), s 63(1).

124 *Senate Standing Order* 25(21). See also Harry Evans, *Odgers' Australian Senate Practice* (11th ed, 2004) pp 386-387.

125 *House of Representatives Standing Order* 215(c). See also Ian Harris (ed), *House of Representatives Practice* (5th ed, 2005) p 624.

126 See *Senate Standing Order* 25(20)(e); *House of Representatives Standing Order* 215(c).

127 See Harry Evans, *Odgers' Australian Senate Practice* (12th ed, 2008) pp 360-362 and 366-371. See also Department of the Senate, *Consideration of Estimates by the Senate Committees*, Senate Brief No 5 (2006).

128 IP Australia is a prescribed Agency under the *Financial Management and Accountability Regulations 1997* (Cth) r 5 and sch 1 (item 151).

129 See Budget Speech 2006 and associated documents were delivered on 9 May 2006 as the Second Reading to the *Appropriation Bill (No 1) 2006* (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 2006, pp 57-65 (Peter Costello, Treasurer). See also Commonwealth, *Parliamentary Debates*, Senate, 9 May 2006, pp 115-116 (Nick Minchin, Minister for Finance and Administration).

130 See Department of Industry, Tourism and Resources, *Annual Report 2006-2007* (2007).

reporting periods from the 2008 Budget[131] to the 2008-2009 *Annual Report*[132] that covers the period of the 2008 Budget allocation (Table 8.3); and (3) the projected reporting criteria for the formal reporting periods from the 2009 Budget[133] to the 2009-2010 *Annual Report*[134] that covers the period of the 2009 Budget allocation (Table 8.4). Within the institution of the then Department of Industry, Tourism and Resources (now the Department of Innovation, Industry, Science and Research) and IP Australia a number of personalities have powers: the Secretary of the then Department of Industry, Tourism and Resources/now Department of Innovation, Industry, Science and Research has responsibility under the *Public Service Act 1999* (Cth) (and the *Workplace Relations Act 1996* (Cth)/*Fair Work Act 2009* (Cth)) as an 'Agency Head',[135] and the Director General has responsibility under the *Financial Management and Accountability Act 1998* (Cth) as a 'Chief Executive'.[136] IP Australia has a regulatory function promoting innovation, investment and international competitiveness (or trade), in part, through allocating time-limited 'exclusive rights' under the *Patents Act 1990* (Cth).[137] Within IP Australia the 'decision'[138] to grant or refuse to grant[139] these 'exclusive rights' is made by a statutory office holder, the Commissioner of Patents ('Commissioner').[140] Figure 8.1 illustrates the web of accountability applying to decisions made by the Commissioner.

As part of the annual appropriation arrangements for 2006-2007, IP Australia recorded the following resources, in summary:

> IP Australia operates on a full cost recovery basis and utilises the receipts from charges for intellectual property services to fund its operations … The only funds received directly via the Appropriation Bills in 2006-07 relate to notional interest paid against the IP Australia Special Account ($1.787m), last financial year's measure in relation to the China Free Trade Agreement ($0.268m) and a small administered amount in relation to Plant Breeder's Rights ($0.074m). The balance of IP Australia's expenditure is appropriated via the use of a Special Account established under the *Financial Management and Accountability Act 1997*.[141]

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131 See Budget Speech 2008 and associated documents were delivered on 13 May 2008 as the Second Reading to the *Appropriation Bill (No 1) 2006* (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 2008, pp 2600-2608 (Wayne Swan, Treasurer). See also Commonwealth, *Parliamentary Debates*, Senate, 13 May 2008, p 1559 (Nick Sherry, Minister for Superannuation and Corporate Law).

132 See Department of Innovation, Industry, Science and Research, *Annual Report 2008-09* (2009).

133 See Budget Speech 2009 and associated documents were delivered on 12 May 2009 as the Second Reading to the *Appropriation Bill (No 1) 2006* (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 2009, pp 3531-3539 (Wayne Swan, Treasurer). See also Commonwealth, *Parliamentary Debates*, Senate, 12 May 2009, p 2468 (Nick Sherry, Minister for Superannuation and Corporate Law).

134 Department of Innovation, Industry, Science and Research, *Annual Report 2009-10* (2010).

135 See *Public Service Act 1999* (Cth) s 9.

136 See *Financial Management and Accountability Act 1997* (Cth) s 5; *Financial Management and Accountability Regulations 1997* (Cth) r 5 and sch 1 (item 128A).

137 These 'exclusive rights' are 'during the term of the patent, to exploit the invention and to authorise another person to exploit the invention' where the term 'exploit' means 'in relation to an invention, includes: (a) where the invention is a product – make, hire, sell or otherwise dispose of the product, offer to make, sell, hire or otherwise dispose of it, use or import it, or keep it for the purpose of doing any of those things; or (b) where the invention is a method or process – use the method or process or do any act mentioned in paragraph (a) in respect of a product resulting from such use': *Patents Act 1990* (Cth) ss 13 and sch 1 ('exploit').

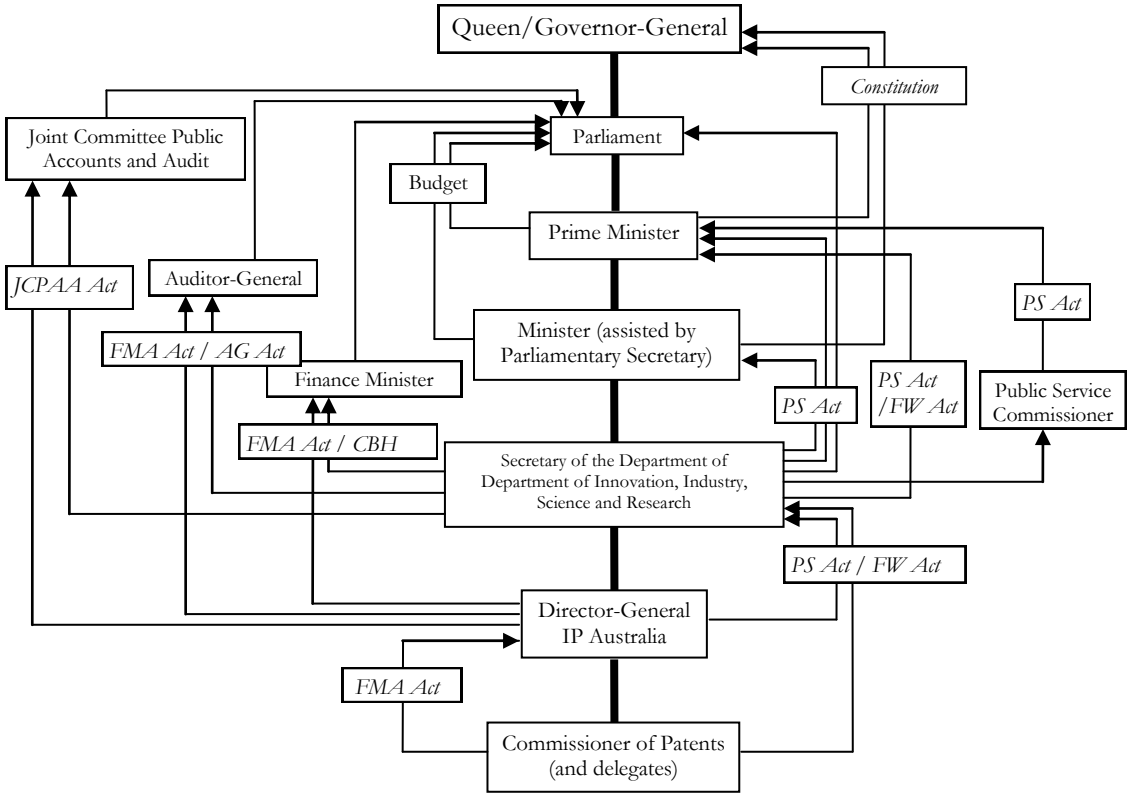
138 In the nature of an administrative determination: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 335-338 (Mason J), 365 (Brennan J), 369 (Deane J). Notably, this conception of a 'decision' contemplates the place of other considerations that 'guides but does not control the making of decisions': *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640-641 (Brennan J). See also *Tang v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 177 at 178 (Evatt J), 183 (Davies J), 189-190 (Pincus J).

139 See *Patents Act 1990* (Cth) ss 45 (examination), 59 (opposition) and 207 (general powers).

140 *Patents Act 1990* (Cth) s 207.

141 Department of Finance and Administration, *Portfolio Budget Statements 2006-2007: Industry, Tourism and Resources Portfolio*, Budget Related Paper No 1.13 (2006) p 83. See also Department of Finance and Administration, *Portfolio Budget Statements 2007-2008: Industry, Tourism and Resources Portfolio*, Budget Related Paper No 1.14 (2007) p 89.

Figure 8.1: The web of accountability applying to decisions made by the Commissioner of Patents under the *Patents Act 1990* (Cth).
AG Act – Auditor-General Act 1997 (Cth); *CBH Act – Charter of Budget Honesty Act 1996* (Cth); *FW Act – Fair Work Act 2009* (Cth); *FMA Act – Financial Management and Accountability Act 1997* (Cth); *PS Act – Public Service Act 1999* (Cth).



The main annual appropriations for 2006-2007, the *Appropriation Act (No 1) 2006-2007* (Cth), recorded for IP Australia amounts up to a total $2 129 000, comprising Departmental Outputs of $2 055 000 and Administered Expenses of $74 000 for 'Outcome 1 – Australians benefit from the effective use of intellectual property, particularly through increased innovation, investment and trade'.[142] The '*Portfolio Budget Statements*' were declared to detail activities (the outputs/programs) relevant to the appropriated outcomes.[143] The relevant details for 2006-2007 are set out in Table 8.1. The contributions to achieving Outcome 1 were stated to be:

> A robust intellectual property (IP) system stimulates investment and trade by providing incentives for individuals and industry to invent and create. IP Australia contributes to the achievement of its outcome through three main areas – IP Rights administration, education and advice.
>
> Through the administration and regulation of Patent, Trade Mark, Design and Plant Breeder's Rights, IP Australia ensures a sound intellectual property protection regime, providing investors with confidence that products and brands will not be threatened with unauthorised use. IP Australia's regulatory role also includes an accreditation and registration system for IP professionals to ensure a level of quality advice is available.
>
> To ensure business and individuals are aware of the importance of IP rights and fully understand the best type of right for their need, IP Australia undertakes an education and awareness role. Engagement in the international intellectual property system is also crucial to ensure improved access for Australia to the global market.
>
> As IP becomes of increasing interest to business investing in research and supporting innovation, and to Government in negotiating international trade agreements, IP Australia's role in supporting quality research and

[142] *Appropriation Act (No 1) 2006-2007* (Cth) ss 7 (departmental items), 8 (administered items) and 15 (appropriation) and sch 1.
[143] *Appropriation Act (No 1) 2006-2007* (Cth) s 4(2).

> providing policy advice is growing. This specialist advice enables Australia to keep on the forefront of IP issues and be influential in international activities.[144]

The *Appropriation Act (No 5) 2006-2007* (Cth) and the *Portfolio Additional Estimates Statements* varied the appropriated amounts but made no change to the principal objectives and functions of IP Australia for Outcome 1.[145] A detailed summary of the prospective performance measures in the outcomes and outputs/programs framework are set out in Tables 8.1 and 8.2.

The other appropriations for IP Australia are standing appropriations through Special Accounts. Special Accounts under the *Financial Management and Accountability Act 1997* (Cth) are established either by the Minister responsible for the *Financial Management and Accountability Act 1997* (Cth) (the 'Finance Minister')[146] by written determination[147] or as a provision in legislation.[148] In both instances they are a ledger[149] of the CRF.[150] The essential features of Special Accounts are that they: are a method by which money may be drawn from the 'Treasury of the Commonwealth'[151] for the expenditure purposes of the Commonwealth; articulate the requirements of an appropriation from the CRF; set out an authorisation to expend; and, identify the Commonwealth purposes for which that money may be expended.[152]

Table 8.1: Effectiveness measurements for Outcome 1 (2006-2007)
Derived from Department of Finance and Administration, *Portfolio Budget Statements 2006-2007: Industry, Tourism and Resources Portfolio*, Budget Related Paper No 1.13 (2006) pp 82 and 92 and Department of Industry, Tourism and Resources 2006-2007 Performance Reporting Structure from Department of Industry, Tourism and Resources, *Annual Report 2006-2007* (2007) p 128.

Outcome	Outcome particulars	Sub-outcomes	Effectiveness through measures, indicators and targets
Outcome 1: Australians benefit from the effective use of intellectual property, particularly through increased innovation, investment and trade	IP Australia seeks to achieve this outcome by administering the Patents … acts, promoting the benefits of intellectual property and participating in the development of international IP systems	Australians benefit from IP initiatives	*Analysis of benefit through periodic research and programs studies and independent reviews *Increased application by Australian industry for international IP Rights
		Customer and stakeholder satisfaction	*Customer satisfaction with products and services measured through surveys and feedback *Ministerial and stakeholder feedback
		Recognised as best practice in administration and delivery of high quality IP system	*Compliance with quality management framework *Results of periodic benchmarking studies *Feedback from overseas offices involved in bilateral agreements with IP Australia
		Ongoing financial viability and cost effective	*IP Australia prices aligned to Outcome and in operations compliance with cost recovery policy and international competitiveness *Products and service charges remain internationally competitive

144 Department of Finance and Administration, *Portfolio Budget Statements 2006-2007: Industry, Tourism and Resources Portfolio*, Budget Related Paper No 1.13 (2006) p 91.
145 See Department of Finance and Administration, *Portfolio Additional Estimates Statements 2006-2007: Industry, Tourism and Resources Portfolio* (2007) p 43. The revised appropriation for Output 1 was $2 506 000 and for Output 2 was $391 000 to reflect notional interest for Special Accounts of $842 000.
146 *Financial Management and Accountability Act 1997* (Cth) s 5. The 'Finance Minister' is currently the Minister for Finance and Administration.
147 *Financial Management and Accountability Act 1997* (Cth) s 20. Noting that such determinations are disallowable instruments that must satisfy special procedural requirements before the Parliament before they take effect (s 22).
148 *Financial Management and Accountability Act 1997* (Cth) s 21. A listing of these Acts is set out in Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Inquiry into the Draft Financial Framework Legislation Amendment Bill*, Report 395 (2003) app K.
149 They are an 'account … used to record moneys received for a designated purpose and expenditure of those moneys': Explanatory Memorandum, *Financial Management Legislation Amendment Bill 1999* (Cth) p 3.
150 See *Constitution* s 81. Note also *Constitution* ss 66 and 82.
151 This is 'any fund or sum of money standing to the credit of the Crown in right of the Commonwealth': *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 573 (Mason CJ, Deane, Toohey and Gaudron JJ). In other words, the moneys actually held by the Commonwealth.
152 *Financial Management and Accountability Act 1997* (Cth) s 20. See Department of Finance and Administration, *Guidelines for the Management of Special Accounts*, Financial Management Guidance No 7 (2003) pp 3-15.

Table 8.2: Actual performance measures for Outcome 1 (2006-2007)
From Department of Industry, Tourism and Resources 2006-2007 Performance Reporting Structure from Department of Industry, Tourism and Resources, *Annual Report 2006-2007* (2007) pp 138-142: 'Outcome 1: Australians benefit from the effective use of intellectual property, particularly through increased innovation, investment and trade'.

Output groups	Output particulars	Sub-outputs	Customer/stakeholder	Prospective performance	Actual performance
Output 1: Intellectual property rights administration and professional registration	IP Administration and Professional Registration encompasses the administration of Patent, Trade Mark, Design and Plan Breeder's IP rights legislation. This output also includes the administration of the Professional Standards Board for Patent and Trade Marks Attorneys and the Patent Attorneys Disciplinary Tribunal	Quality	Patents indicator	*Compliance with IP Australia customer service charter and quality standards	*Greater than 96% compliance …
			Professional Standards Board	*Stakeholder satisfaction with secretariat support	*All high levels of satisfaction …
		Quantity	Patents	*26,231 Patent applications *17,000 Patent examinations	*26, 365 applications were made *17,310 examinations were performed
			Professional Standards Board	*60 applications for registrations *1,070 current registrations	*132 applications for registration *1032 current registrations
		Price	Patents	*Cost: $65.888m	*Cost: $63.295m
			Professional Standards Board	*Cost: $0.451m	*Cost: $0.519m
Output 2: Awareness, education and international engagement	Awareness, Education and International Engagement represents IP Australia's role in raising awareness and educating customers about intellectual property, and engaging with key international stakeholders and IP bodies	Quality	International Engagement Awareness & Education	*Australian business demonstrates increased awareness of intellectual property *Business sectors consider information useful, accessible and easy to understand	*3354 people attended presentations *1383 website visitors, 94.4% found information useful
			International Engagement	*Key outcomes achieved through participation at key international and regional forums *Key agreements reached and implemented with targeted international IP offices	*Delivered symposiums, and so on *Signed MOU and so on
		Quantity	Awareness & Education	*Number of information kits distributed. *Number of brochures downloaded from IP Australia's website. *Number of subscribers to online subscriber lists	*14670 kits distributed *86,102 brochures downloaded *5380 subscribers
			International Engagement	*Number of International activities and agreements. *Number of externally funded aid projects delivered against key target segments	*110 international activities *5 major projects
		Price	Awareness & Education	*Cost: $2.208m	*Cost: $2.010m
			International Engagement	*Cost: $1.036m	*Cost: $2.001m
Output 3: Advice to government	Advice to Government relates to IP Australia's role in providing advice on intellectual property matters, and supporting research into the current and future use of IP Rights	Quality	Policy and legislation	*Satisfaction of stakeholders with quality and timeliness of advice on policy and legislation, ministerial correspondence, speeches & briefings, submissions to reviews and Government responses	*"All stakeholders reported high levels of satisfaction …"
			IP Research	*Increased understanding of IP issues impacting on Australian industry.	*Increasing use of IP Australia-supported research …"
			Support for Advisory Boards	*Council & Board satisfaction with quality of secretariat and research support provided	*"… all have reported high levels of satisfaction …"
		Quantity	Policy and legislation	*Number of draft bills, regulation changes, amendments ministerial responses & briefs prepared	*1 Bills *2 Regulations
			IP Research	*Number of IP research initiatives	*17 initiatives, 15 reports/papers …
			Support for Advisory Boards	*Number of ACIP reviews undertaken *Number of meetings, briefings and seminars held	*Progressed current reviews *15 meetings
		Price	Policy and legislation	Cost: $1.521 million	*Cost: $2.272 million
			IP Research	Cost: $0.524 million	*Cost: $0.276 million
			Support for Advisory Boards	Cost: $1.320 million	*Cost: $1.110 million

Table 8.3: Actual performance measures for Outcome 1 (2008-2009)
From Department of Innovation, Industry, Science and Research, *Annual Report 2008-09* (2009) p 122 and Department of Finance and Deregulation, *Portfolio Budget Statements 2008-2009: Innovation, Industry, Science and Research Portfolio*, Budget Related Paper No 1.14 (2008) pp 173-175: 'Outcome 1: Australians benefit from the effective use of intellectual property, particularly through increased innovation, investment and trade'.

Output groups	Components (*with the results to be achieved*)	Key Performance Indicators	2008-09 targets	Results Achieved
Output 1.1: Intellectual property rights and professional registration	*Intellectual property rights – IP rights administration, search and examination *IP Australia will deliver intellectual property rights that are valued in the community and are enforceable when required. IP Australia will strive to create an intellectual property system that is simple, open, fair and which offers value for money* *Professional registration – Registration processing and Professional Standards Board secretariat *IP Australia will successfully undertake its functions associated with persons wishing to qualify for registration as patents and/or Trade Marks Attorneys and will provide effective secretariat support for the Professional Standards Board*	Compliance with agreed Customer Charter standards	*80% or greater compliance with agreed Customer Service Standards	*88% compliance with agreed Customer Service Standards
		Receipt of patent applications and provisions of patent examination services	*Applications: 37,595 *Examinations: 17,000	*Applications: 24,985 *Examinations: 19,336
		Receipt of Professional Standards Board applications and provision of Professional Standards Board registration services	*Applications: 457 *Registrations: 1,206	*Applications: 387 *Registrations: 1,170
		Costs of delivering this output group (which includes trade marks, designs and plant breeder's rights applications and registration services)	*$132.728 million	*$132.235 million
Output 1.2: Awareness, education and international engagement	*Awareness and education *IP Australia will facilitate understanding of the value of and access to the domestic and international intellectual property system among its stakeholders in line with Australia's interests* * International engagement *IP Australia will influence the development of effective intellectual property systems internationally in line with Australia's interests*	Awareness and education – actual participation in awareness and education activities compared with plan	*90% of planned activities conducted and implemented	*94% of planned activities conducted and implemented
		International engagement – actual participation in international engagement activities compared with the plan	*90% of planned activities conducted and implemented	*More than 90% of planned activities conducted and implemented
		Cost of delivering services for this output group	*$7.969 million	*$7.635 million
Output 1.3: Advice to government	*Policy and legislation *IP Australia's program of policy and legislative change will assist in the development of a strong, more harmonised international intellectual property system that is in line with Australia's interests* *IP research *IP Australia will contribute to research in intellectual property issues to support its legislative and policy effort and its Advisory Boards* * Support for Advisory Boards *IP Australia will provide effective support to the Advisory Council on Intellectual Property*	Quality of advice to government	*Less than 10% of ministerial responses are returned for rework or are overdue	*Less than 5% of ministerial responses were returned for rework or were overdue
		Policy and legislative program – actual participation in policy and legislative activities compared with plan	*90% of planned activities conducted and implemented	*More than 90% of planned activities conducted and implemented
		IP Research – actual participation in research activities compared with plan	*90% of planned activities conducted and implemented	*More than 90% of planned activities conducted and implemented
		Cost of delivering services for this output group	*$4.202 million	*$4.103 million

Table 8.4: Actual performance measures for Outcome 1 (2009-2010)
From Department of Finance and Deregulation, *Portfolio Budget Statements 2009-2010: Innovation, Industry, Science and Research Portfolio*, Budget Related Paper No 1.14 (2009) pp 221-244 ('Outcome 1: Increased innovation, investment and trade in Australia and by Australians overseas, through the administration of the registrable intellectual property rights system, promoting public awareness and industry engagement, and advising government') and Department of Innovation, Industry, Science and Research, *Annual Report 2009-10* (2010) pp 97-101.

Sub-program 1.1: IP Rights Administration and Professional Registration

Sub-programs	Sub-program objectives	Key Performance Indicators	Deliverables (PBS)		Results Achieved (Annual Report)
Sub-program 1.1: IP rights administration and professional registration	*Intellectual property rights: IP Australia will deliver robust IP rights and satisfy our customers in terms of timeliness and value for money. IP Australia will be recognised as one of the leading IP offices in the world for the quality (including accuracy and consistency) of the IP rights we grant *Professional registration: IP Australia will successfully undertake its functions associated with persons wishing to qualify for registration as Patents and/or Trade Marks Attorneys and will provide effective secretariat support to the Professional Standards Board	Intellectual property rights *The level of customer satisfaction with the consistency of our work *IP Australia's performance in benchmarking against quality standards (both domestic and international) *The level of maturity of quality assurance systems *Timeliness of services against service charter standards *The level of work on hand for each IP right reduced, avoidance of backlog Professional Standards Board *Stakeholder satisfaction with secretariat support	*Receipt of patent applications	24,100	25, 344
			*Provision of patent examination services	20,400	27, 700
			*Receipt of Professional Standards Boards applications	130	110
			*Provision of Professional Standards Board registration services	1,198	1, 122
	Sub-program expenses (which includes trade marks, designs and plant breeder's rights applications and registration services)		*$134,791 million		$129, 125 million

Table 8.4 continued over …

Sub-program 1.2: Awareness, Education and International Engagement

Sub-programs	Sub-program objectives	Key Performance Indicators	Deliverables (PBS)	Results Achieved (Annual Report)
Sub-program 1.2: Awareness, education and international engagement	*Awareness and education: IP Australia will facilitate understanding of the value of and access to the domestic and international intellectual property system among its stakeholders in line with Australia's interests *International engagement: IP Australia will influence the development of effective intellectual property systems in line with Australia's interests	Awareness and education *Quantity* •The proportion of customers that deal with us electronically.	*Awareness, Education and International Engagement represents IP Australia's role in raising awareness and educating customers about intellectual property, and engaging with key international stakeholders and IP bodies *Under the awareness and education objective of this sub-program IP Australia will deliver Public Education and Awareness programs, which promote the importance of IP and provide Australians with the tools they require to make informed decisions regarding IP *Under the international engagement objective of this sub-program IP Australia will proactively manage customer and international engagement activities, including development and cooperation activities.	*There has been little upward movement in the proportion of customers who deal with us electronically (although significantly more online transactions occur in the trade marks business line than in patents). *IP Australia's major program of ICT modernisation, especially the Integrated Customer Service Delivery (ICSD) Program, should lift the proportion significantly in coming years.
		•The level of use of public information services.		*The number of total visitors to IP Australia's website increased by 20 per cent in 2009–10 compared to the previous financial year. Subscribers to IP Australia's small and medium business e-newsletter increased by more than 45 per cent in the same period.
		•The level of use of fast-track applications and registration options.		*IP Australia's customers lodged fewer fast tracked patent applications in 2009–10 than in 2008–09 — 456 compared with 454. Ten of these lodgements cited green technology as the reason.
		Quality •Increased public awareness of intellectual property rights.		*Research indicates that 67 per cent of SMEs are either somewhat or very aware of IP protection. This is the same percentage as in the 2008–09 research.
		•The level of customer satisfaction with information services.		*The 2009 Service Evaluation found that the trend in satisfaction with online services is upwards with accuracy, ease of use, and look and feel leading the upwards trend. *Attorneys reported higher levels of satisfaction compared to self-filers whose experience was moderated by the individual's prior knowledge or exposure to intellectual property.
		International engagement *Quantity* •The amount of international work sharing.		*Forty-one cases were considered under the Vancouver Group Mutual Exploitation (VGME) Initiative during 2009–10. This will increase significantly in 2010–11. *In 2009–10, 26 requests to fast-track AU applications were received via the Patent Prosecution Highway (PPH) with the United States Patents and Trademarks Office.
		•Number of international activities and agreements.		*40 overseas trips were undertaken in 2009–10, primarily to participate in multilateral and bilateral meetings. See below for the outcomes of this participation. *In 2009–10, IP Australia participated in the development of three agreements with international IP offices. See below for more information on key agreements achieved.
		•Number of externally funded aid projects delivered against key target segments.		*The following development cooperation projects/activities in 2009–10 were partially funded by external organisations (identified in brackets): ■■ Intellectual Property Explorer — IPR web resource for SMEs (APEC, the Hong Kong Intellectual Property Department, and the Intellectual Property Office of Singapore).
		Quality •The level of customer satisfaction with access to international IP system.		*The 2009 Service Evaluation found that 79 per cent of customers found the ease of access to the international IP system to be good, very good or excellent, with 92 per cent describing the ease of access as either the same or better when compared with earlier experiences.
		•The achievement of key outcomes through participation at key international and regional forums.		*Key outcomes achieved in 2009–10 included: ■■ renewal of the mandate of the WIPO Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore. The mandate renewal has started to provide momentum to WIPO normative activities; ■■ agreement to several measures to enhance the Patent Cooperation Treaty system. These will make the patent system more efficient and increase the quality of examination; ■■ agreement to a coordination mechanism for the WIPO Committee on Development and IP. This agreement contributes to maintaining balance in WIPO as an international IP system delivery agency and an agency responsible for economic development, technical assistance and capacity building.
		•Key agreements reached and implemented with targeted international IP offices.		*Key agreements reached in 2009–10 included: ■■ the VGME initiative agreed in July 2009 between the Australian, Canadian and UK IP offices, enabling exploitation of existing search and examination reports on equivalent applications; ■■ the 2010 European Patent Office — IP Australia Memorandum of Understanding agreed in November 2009, setting out key cooperation activities with one of the world's largest patent offices; and ■■ the 2010–11 WIPO - Australia Work Plan agreed in November 2009, which articulates development cooperation projects for the Asia and Pacific Region.
	Sub-program expenses		*$8,093 million	$9, 403 million

Sub-program 1.3: Advice to Government

Sub-programs	Sub-program objectives	Key Performance Indicators	Deliverables (PBS)	Results Achieved (Annual Report)
Sub-program 1.3: Advice to government	*Policy and legislation: IP Australia's program of policy and legislative change will foster Australian innovation by shaping the development of the IP system both at home and abroad *IP research: IP Australia will contribute to research in intellectual property issues to support its legislative and policy effort and its advisory boards *Support for advisory boards: IP Australia will provide effective support to the Advisory Council on Intellectual Property.	Policy & Legislation *Quality* •Satisfaction of stakeholders with quality and timeliness of advice on policy and legislation, and ministerial correspondence, speeches & briefings, submissions to reviews and Government responses	*Advice to Government relates to IP Australia's role in providing advice on intellectual property matters, and supporting the research into the current and future use of IP Rights *Under the policy and legislative objective of this sub-program IP Australia will provide IP policy advice across government and internationally	*IP Australia's policy and advice is consistently delivered on time. Less than 5 per cent of IP Australia's ministerial contributions are returned for re-work.
		Quantity •The number of ministerial briefs and responses		*In 2009–10, IP Australia provided 34 pieces of ministerial correspondence, 19 information briefs, 20 action briefs, 14 engagement briefs, 15 question time briefs and 2 meeting records to the Minister.
		IP Research *Quality* •Increased understanding of IP issues impacting on Australian business.		*Through IP Australia's biannual Business and Industry Forum, business issues related to IP and intangible assets have been identified, discussed and acted upon. The forum includes representatives from the Australian Industry Group, the Australian Chamber of Commerce and Industry, the Institute of Chartered Accountants and the Certified Practising Accountants of Australia.
		Quantity •The number of IP research initiatives		*IP Australia conducted four strategic research projects during 2009–10. Of these strategic research initiatives, 100 per cent were completed on time, within budget and to the anticipated standard. *IP Australia also agreed to provide $2 million over four years to support the Intellectual Property Research Institute of Australia, to assist in its multi-disciplinary IP research work.
		Support for Advisory Boards *Quality* •Council & Board satisfaction with quality of secretariat and research support provided		*IP Australia's Advisory Boards indicated that they were very satisfied with secretariat and research support during 2009–10.
		Quantity •The number of ACIP reviews completed		*During 2009–10, the Advisory Council on Intellectual Property completed two reviews — the review of Post Grant Patent Enforcement strategies and a review of the Enforcement of Plant Breeder's Rights.

	Sub-program expenses		*$4,267 million	$4, 970 million

IP Australia administers a number of Special Accounts established by written determination.[153] Importantly, however, the full cost recovery by IP Australia from 'customers' of its intellectual property services that are used to fund its operations are conducted through a Special Account.[154] As a consequence, the Special Account acts as a standing appropriation of the amount credited to the account that is supplemented with any annually appropriated 'notional interest' and various other amounts for identified purposes (as set out above).[155] However, the costs recovered from 'customers' of intellectual property services[156] also include a component of the costs of IP Australia's activity and another component related to other policy considerations.[157] These include rising annual renewal fees after the fifth year so that less innovative patents extract lower economic rents (discouraging unwanted patents),[158] a waiver of fees for public goods (such as lower costs for small to medium sized enterprises),[159] and so on.

For the IP Australia Special Account used to credit receipts from charges for intellectual property services to fund its operations the appropriation is set out in the *Financial Management and Accountability Act 1997* (Cth): '[t]he CRF is hereby appropriated for expenditure for the purposes of a Special Account … up to the balance for the time being of the Special Account the expenditure purpose of the Commonwealth'.[160] The Commonwealth purpose is set out in the determination establishing the Special Account: '[f]or expenditure related to the development and administration of intellectual and industrial property systems, including the provision of property rights in inventions … and matters incidental thereto' and '[f]or expenditure comprising payments of moneys to the [CRF], as agreed from time to time by the Minister for Finance and the relevant Minister, in addition to payments expressly required to be paid to that fund under legislation'.[161] The appropriated

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[153] These are: 'IP Australia Special Account (Departmental) … for expenditure in connection with the provision of services in relation to intellectual property'; 'Other Trust Monies – World Intellectual Property Organisation … for the receipt of moneys temporarily held in trust for the World Intellectual Property Organisation under the *Patent Cooperation Treaty* and Madrid protocol and IP legislation'; 'Other Trust Monies – Security of Costs … for the receipt of moneys held as a security in respect of the costs of the opposition proceedings under … s 219 of the *Patents Act 1990* [(Cth)]'; 'services for Other Governments and Non-Agency Bodies Account … [for] monies advanced to IP Australia by Comcare for the purpose of distributing compensation payments made in accordance with the *Safety, Rehabilitation and Compensation Act 1998* [(Cth)]'; and, 'services for Other Governments and Non-Agency Bodies Account – IP Australia Salary Packaging … for payment of Salary Packaging expenses on behalf of current IP Australia employees in accordance with the IP Australia Certified Agreement': Department of Industry, Tourism and Resources, *Annual Report 2006-2007* (2007) pp 369-371. See also Department of Finance and Administration, *Portfolio Budget Statements 2006-2007: Industry, Tourism and Resources Portfolio*, Budget Related Paper No 1.13 (2006) p 86 (listing only three of these Special Accounts).

[154] See Department of Industry, Tourism and Resources, *Annual Report 2006-2007* (2007) p 145 and 369; Department of Industry, Tourism and Resources, *Annual Report 2005-2006* (2006) pp 133-134 and 362.

[155] See, for example, Department of Finance and Administration, *Portfolio Budget Statements 2006-2007: Industry, Tourism and Resources Portfolio*, Budget Related Paper No 1.13 (2006) p 83. See also Department of Finance and Administration, *Portfolio Budget Statements 2007-2008: Industry, Tourism and Resources Portfolio*, Budget Related Paper No 1.14 (2007) p 89.

[156] This was a policy that already featured in patent practice at the time the *Patents Act 1990* (Cth) was implemented: see, for example, Department of Industry, Technology and Commerce, *Annual Report 1989-1990* (1990) p 98.

[157] For example, this includes agreed charges applying under international agreements, such as applications filed under the *Patent Cooperation Treaty* [1980] *Australian Treaty Series* 6 in an agreement with the World Intellectual Property Organisation.

[158] *Patents Regulations 1991* (Cth) sch 7(pt 2). See also Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000) pp 144, 156 and 157; IP Australia, *Government Response to Intellectual Property and Competition Review Recommendations* (2001) p 7.

[159] See, for example, IP Australia, *Corporate Guidelines for Refunds and Waivers* (2007) p 13.

[160] *Financial Management and Accountability Act 1997* (Cth) s 20(4).

[161] *Initial Determination to Establish Components of the Reserved Money Fund* (1997) sch. Notably the *Financial Management Legislation Amendment Act 1999* (Cth) s 5 merged the Loan Fund and the 'components' of the Reserve Money Fund and the Commercial Activities Fund into the single CRF with the 'new' Special Accounts preserving the rights and obligations of the 'components' of the Reserve Money Fund and Commercial Activities Fund: Department of Finance and Administration, *Reserved Money Fund (RMF) and Commercial Activities Fund (CAF) – Transition to 'Special Accounts'*, Finance Circular 1999/03 (1999); Department of Finance and Administration, *Guidelines for the Management of Special Accounts*, Financial Management Guidance No 7 (2003).

amount credit to the Special Account available to expend is recorded in 2006-2007 ('receipts') as $120 224 000 and *associated* with the 'Outcome 1' in the terms 'Australians benefit from the effective use of intellectual property, particularly through increased innovation, investment and trade'.[162] Importantly, the *Portfolio Budget Statements* records the Special Account balance as 'receipts' and distinct from the amount of the annual appropriation by the *Appropriation Act (No 1) 2006-2007* (Cth).[163] Presumably the expenditure purposes of the annual appropriation and the Special Account appropriation are within the meaning of the terms of both forms of appropriation purposes and that the outcomes and outputs/programs framework also applies to the Special Account standing appropriations.[164] This appears to be the approach adopted by IP Australia.[165]

By way of a contrast Table 8.3 sets out a similar comparison to Tables 8.1 and 8.2 but for the period of the appropriations 2008-2009 for the IP Australia in the now Department of Innovation, Industry, Science and Research.[166] The paucity of data and information compared with the period of the appropriations 2006-2007 is perhaps surprising, given the rhetoric of 'Operation Sunlight' and the Australian Government's response.[167] Table 8.4 sets out similar comparison for the period of the appropriations 2009-2010 for the IP Australia in the Department of Innovation, Industry, Science and Research.[168]

8.6 Employment outside the *Public Service Act 1999* (Cth)

The main schemes of Commonwealth employment outside the *Public Service Act 1999* (Cth) are for the members of the defence forces,[169] staff of Senators and Members of Parliament,[170] staff of ex-Prime Ministers,[171] officers and employees of the High Court,[172] and so on.[173] In almost every

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[162] Department of Finance and Administration, *Portfolio Budget Statements 2006-2007: Industry, Tourism and Resources Portfolio*, Budget Related Paper No 1.13 (2006) p 84. See also Department of Finance and Administration, *Portfolio Additional Estimates Statements 2006-2007: Industry, Tourism and Resources Portfolio* (2007) p 44.

[163] Department of Finance and Administration, *Portfolio Budget Statements 2006-2007: Industry, Tourism and Resources Portfolio*, Budget Related Paper No 1.13 (2006) p 84.

[164] Similar dual appropriations have been considered by the High Court, although the issue of inconsistency or supremacy has not been resolved. See, for example, *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). While this may be of little practical consequence there are potentially significant issues where the appropriations are double counted in the calculation of surplus revenue due to the States (*Constitution* s 94), and where an appropriation is for 'the necessary supplies for the ordinary annual services of Government' (*Constitution* ss 53 and 54). Notably, to expend money there must be both an appropriation law *and* a spending law as an appropriation is not sufficient by itself to authorise spending: see *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 55 (French CJ), 74 and 82-83 (Gummow, Crennan and Bell JJ), 113 (Hayne and Kiefel JJ), 210-213 (Heydon J).

[165] See, for examples, Department of Industry, Tourism and Resources, *Annual Report 2006-2007* (2007) p 25; Department of Industry, Tourism and Resources, *Annual Report 2005-2006* (2006), p 19.

[166] See Department of Innovation, Industry, Science and Research, *Annual Report 2008-09* (2009) p 114-144; Department of Finance and Deregulation, *Portfolio Budget Statements 2008-2009: Innovation, Industry, Science and Research Portfolio*, Budget Related Paper No 1.14 (2008) pp 165-185.

[167] See Andrew Murray, *Review of Operation Sunlight: Overhauling Budget Transparency* (2008) pp 24-26; Finance and Public Administration Committee, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 50-52; Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 2006-07 (2007) pp 90-94. See also Department of Finance and Deregulation, *Government Response to the Review of Operation Sunlight: Overhauling Budget Transparency* (2008) p 6.

[168] See Department of Finance and Deregulation, *Portfolio Budget Statements 2009-2010: Innovation, Industry, Science and Research Portfolio*, Budget Related Paper No 1.14 (2009) pp 219-244.

[169] The Governor-General appoints officers while enlisted sailor, soldier or airman take an oath or affirmation: see *Defence (Personnel) Regulations 2002* (Cth) rr 15 (officers) and 25(1) and sch 2 (sailors, soldiers or airmen).

[170] *Members of Parliament (Staff) Act 1984* (Cth) ss 4(1) (Ministers may engage consultants), 13(1) (Office-holders may employ staff) and 20(1) (Senators and Members may employ staff).

[171] *Members of Parliament (Staff) Act 1984* (Cth) s 13(1) (Office-holders may employ staff).

[172] *High Court of Australia Act 1979* (Cth) ss 26(1) and (2).

[173] The classes of employees outside the *Public Service Act 1999* (Cth) are: members of the Australian Defence Force (ADF); members of the Australian Federal Police (AFP); employees of the Australian Security Intelligence Organisation (ASIO) and the Australian Security Intelligence Service (ASIS); employees and office holders of statutory authorities and

instance amounts are appropriated for the payment of those engaged for service for the Commonwealth and those amounts are traceable through the Budget, the financial framework and some form of reporting obligations. For example, the members of the defence forces are commanded by the Chief of the Defence Force, but the Secretary of the Department of Defence has obligations under the *Public Service Act 1999* (Cth) as an 'Agency Head' and the *Financial Management and Accountability Act 1997* (Cth) (with the Defence Materiel Organisation as a 'prescribed Agency' within the Department of Defence) as a 'Chief Executive' that cover the appropriation, expenditures and reporting for the Australian Defence Forces.[174] Under these schemes the *Financial Management and Accountability Act 1997* (Cth) reporting obligations, or comparable standards, generally apply so that there is a 'clear read' between the appropriations and reporting on the spending. Thus, the *Commonwealth Authorities and Companies Act 1997* (Cth) mandates a similar 'clear read' for 'Commonwealth authorities' between the amounts appropriated or received by the authority according to its outcomes/ outputs/programs and the provision of an *Annual Report*.[175] The *Annual Report* is required to conform to standards that are consistent with the PBS.[176] Meanwhile 'Commonwealth companies' are required to comply with their *Corporations Act 2001* (Cth) reporting obligations and provide a copy of their *Annual Report* (including financial, directors and audit reports) to the relevant Minister.[177]

corporations; and ministerial staff and employees of parliamentary departments: see Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112 (2009) p 454.

[174] See Department of Defence, *Defence Annual Report 2008-09*, Volume 1 (2009) pp 38-40.

[175] *Commonwealth Authorities and Companies Act 1997* (Cth) s 9(1) and sch 1.

[176] *Commonwealth Authorities and Companies Act 1997* (Cth) sch 1(item 10).

[177] *Commonwealth Authorities and Companies Act 1997* (Cth) s 36(1).

9. Future challenges

The Australian Government in 1996 emphasised 'contestability' so that the Australian Government was to provide 'products' priced competitively against the possibility that the non-government sector might also provide the same products at a lower price – the focus was on cost efficiency, competitive tendering and contracting out according to a purchaser-provider model.[1] The various reforms through the *Financial Management and Accountability Act 1997* (Cth), *Commonwealth Authorities and Companies Act 1997* (Cth), *Auditor-General Act 1997* (Cth), *Charter of Budget Honesty Act 1998* (Cth) and the *Public Service Act 1999* (Cth) and their amendments have refined this 1996 'contestability' into a rhetoric of outcomes, outputs/programs and performance. This has now pervaded each element of the Budget, the financial and the employment frameworks, and the scrutiny of outcomes, outputs/programs and performance through the various reporting obligations, and primarily the *Annual Report* (the 'clear read'). While this was just the latest in fundamental reforms started by earlier governments,[2] and contributed to by later governments,[3] the milestones in these recent reforms have been:

(a) *Accrual budgeting* – Altering the form and content of the Budget with the prospect that *all* the resources controlled, managed and consumed by an entity for the purposes of achieving an identified outcome are considered rather than just anticipated cash receipts and payments.[4] In addition, tracing the control, management and consumption has the prospect of improved monitoring and control of actual performance, identifying relevant resources, enabling better planning and improving the management of cash flows.[5]

(b) *Focus on expenditure* – With the adoption of accrual budgeting and the outcomes/outputs/programs appropriations following the *Financial Management Legislation Amendment Act 1999* (Cth) the focus of accountability, responsibility and transparency shifted to expenditures. In the words of the then Minister for Finance and Administration:

> An important change under the accrual budget will be the provision of consistent information in the Appropriation Bills, *Portfolio Budget Statements* (PBS) and *Annual Reports*, as all the documents will be presented on an outcomes basis. The lack of linkages between the Bills, PBS and *Annual Reports* has long been a concern to Parliament. Agency *Portfolio Budget Statements* (which will be available on Budget night) will contain detailed information on planned performance of outputs and outcomes on the same outcomes basis as the bills. Additionally, information on actual performance will be published on an outcomes basis in agencies annual reports, enabling a clear read between the Bills, PBS and *Annual Reports*.
>
> Not only will Senators and Members be able to make more informed assessments of the merits of appropriation bills using agency PBS, they will be able to assess actual versus planned performance by comparing information on:
> - price, quantity and quality of outputs; and
> - performance indicators for outcomes,
>
> in an agency's PBS with actual performance information in its *Annual Report*. This will improve Parliamentary scrutiny of the Bills and agency performance.[6]

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[1] See Peter Boxall, 'How the Reforms Fit Together: An Australian Perspective' (1999) *Canberra Bulletin of Public Administration* 117. See also John Wanna and Stephen Bartos, '"Good Practice: Does it Work in Theory?" Australia's Quest for Better Outcomes' in John Wanna, Lotte Jensen and Jouke de Vries, *Controlling Public Expenditure: The Changing Roles of Central Budget Agencies – Better Guardians?* (2003) pp 6-13.

[2] For the progenitors of the current reforms see Australian Public Service Board, *Financial Management Improvement Program: A Diagnostic Study* (1984); J Reid, *Review of Commonwealth Administration* (1983); H Coombs, *Report of the Royal Commission on Australian Government Administration* (1976); and so on.

[3] This has been specifically addressed through the 'Operation Sunlight' review and implementation: see Department of Finance and Deregulation, *Operation Sunlight: Enhanced Budget Transparency* (2008); Andrew Murray, *Review of Operation Sunlight: Overhauling Budgetary Transparency* (2008).

[4] See National Commission of Audit, *Report to the Commonwealth Government* (1996) ch 9.4.

[5] See National Commission of Audit, *Report to the Commonwealth Government* (1996) ch 9.4.

[6] Appropriations and Staffing Committee, Senate, *2005-06 Annual Report* (2006) app 1.

This 'clear read' is perhaps the most significant reform and potentially opened up the Executive to scrutiny that has never before been possible, both in scope and detail.

(c) *Intra-Executive fiscal discipline* – The *Charter of Budget Honesty Act 1998* (Cth) provides for fiscal management to be formulated according to principles and a strategy,[7] and fiscal reporting.[8] For the Budget this means that it must 'be set in a sustainable medium-term framework' and 'based on the principles of sound fiscal management'.[9] The 'principles of sound fiscal management' include 'maintaining Commonwealth general government debt at prudent levels', 'achieving adequate national saving', 'maintain[ing] the integrity of the tax system', and so on.[10] Most importantly, this requires the Executive to release and table 'a fiscal strategy statement for the Government'.[11] Together with the formalisation of forward estimates and more detailed *Portfolio Budget Statements* there is the prospect that governmental finances will be more accountable and transparent.

(d) *Inter-Executive financial relations* – The introduction of performance benchmarks and accountability to the inter-governmental transfers under the COAG *Intergovernmental Agreement on Federal Financial Relations*.[12] This agreement has also streamlined the plethora of payments, clarified the destination of moneys, and imposed standards of accountability, responsibility and transparency.

Unfortunately these significant developments promise to enhanced accountability, responsibility and transparency, *but only if* the Parliament has the capacity to take advantage of that potential. There is no doubt that the original constitutional compromise has altered over the decades and that the recent public administration reforms have entrenched some fundamental changes. Probably the most significant has been the re-framing of the CRF as a self-executing fund and then the proliferation of the means of appropriations through accrual budgeting arrangements. The heresy has been to shift the focus of accountability, responsibility and transparency onto expenditures (and performance) and away from the conception that Parliament should have pre-approved *all* expenditures (through clearly stated appropriation purposes). Unfortunately, most of the legal critique has focus on resurrecting the *Constitution*'s paradigm of Parliament asserting its role over the Australian Government's expenditure at the time of making appropriations.[13] Clearly with the *Financial Management Legislation Amendment Act 1999* (Cth) and the adoption of accrual budgeting and the outcomes/outputs/programs appropriations the focus of accountability, responsibility and transparency *has* shifted to expenditures.[14] To effect these changes, the content of the Appropriation Bills (and associated *Portfolio Budget Statements*) (budget framework) were linked with the related

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[7] *Charter of Budget Honesty Act 1998* (Cth) s 3(1) and sch 1 (ss 4-9). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 1997, pp 12235-12236 (Peter Costello, Treasurer).

[8] *Charter of Budget Honesty Act 1998* (Cth) s 3(1) and sch 1 (ss 10-21). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 1997, p 12236 (Peter Costello, Treasurer).

[9] *Charter of Budget Honesty Act 1998* (Cth) s 4.

[10] *Charter of Budget Honesty Act 1998* (Cth) s 5(1).

[11] *Charter of Budget Honesty Act 1998* (Cth) s 6.

[12] See Council of Australian Governments, *Intergovernmental Agreement on Federal Financial Relations* (2008). See also Council of Australian Governments, *Communiqué*, 29 November 2008.

[13] This also appears to be the preference of most commentators: see, for examples, Geoffrey Lindell, 'The Combet Case and the Appropriation of Taxpayers' Funds for Political Advertising – An Erosion of Fundamental Principles?' (2007) 66 *Australian Journal of Public Administration* 307; Finance and Public Administration References Committee, Senate, *Government Advertising and Accountability* (2005) p 45 citing the submission of the Clerk of the Senate (submission 6e). See also Department of the Prime Minister and Cabinet, *Australia 2020 Summit*, Final Report (2009) pp 319 ('The power of parliament to scrutinise is being slowly whittled away (including the High Court, which effectively wiped out the appropriation power in 2007). There needs to be a reintegration of parliament'), 327 ('more specific budget appropriation'), 328 ('Budgetary process: descriptions of budget appropriations (measures) should be more specific. We should stop allowing vague descriptions of what money is intended to be spent on'), and so on.

[14] See, for example, Appropriations and Staffing Committee, Senate, *2005-06 Annual Report* (2006) app 1.

financial statements according to the *Financial Management and Accountability Act 1997* (Cth) (financial management framework) and the *Annual Reports* according to the *Public Service Act 1999* (Cth) (people management framework) through outcome statements and performance measures (the 'clear read').[15] That is, a shift in the Parliament's focus from scrutinising the future expenditure intentions of the Australian Government (appropriations) to assessing its track record on the expenditures that had been made (audit).[16] While this might be characterised as a breakdown in the Parliament's control over the Australian Government's expenditures,[17] a better view might be that modern governmental administration requires Parliament to embrace the changes and develop new skills, processes and procedures to properly scrutinise the Australian Government's expenditures. This is also consistent with the practical reality of appropriations that it is the Australian Government (the majority in the House of Representatives) that generally initiates expenditure proposals (appropriations) that are either accepted or rejected by the Parliament.[18] This is not an argument to abolish the scrutiny of appropriations, rather a change of emphasis recognising that it is the expenditure reporting that is critical to accountability, responsibility and transparency:

> The main purpose of the budget documentation is to enable Parliamentarians and other users to understand the economic and financial outlook of the [Australian] Government. It explains the composition of the Budget including new budget measures, and expected outputs and outcomes and performance measures for the budget year. At the end of the cycle the annual reports provide audited financial statements and details of the achievements towards the outcomes proposed in earlier budget papers.[19]

The surprising development so far has been the Parliament's reliance on the Australian Government to establish the appropriate standards for the necessary *after* the expenditure scrutiny.[20] This is almost exclusively conducted according to subordinate legislation under the *Financial Management and Accountability Act 1997* (Cth) and the *Commonwealth Authorities and Companies Act 1997* (Cth). According to these arrangements the Australian Government promulgates under the *Financial Management and Accountability Act 1997* (Cth), in some instances subject to disallowance by the Parliament,[21] the safeguarding of Commonwealth money and property,[22] the accounting standards

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[15] For an illustration of the relationship between these frameworks in practice see Charles Lawson, 'Managerialist Influences on Granting Patents in Australia' (2008) 15 *Australian Journal of Administrative Law* 70 at 74-87.

[16] Thus, 'the present importance of appropriation by Parliament, when the Crown and the executive have come to represent the same forces as control a majority in the lower house, may be rather different from what it formerly was and may now lie principally in the opportunity which it affords for criticism by the Opposition and for scrutiny by the public': *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 384 (Stephen J).

[17] See, for examples, Harry Evans, *Odgers' Australian Senate Practice* (11th ed, 2004) p 289; Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Inquiry into the Draft Financial Framework Legislation Amendment Bill*, Report 395 (2003) p 26. See also Geoffrey Lindell, 'The Combet Case and the Appropriation of Taxpayers' Funds for Political Advertising – An Erosion of Fundamental Principles?' (2007) 66 *Australian Journal of Public Administration* 307 at 313-321; Tyrone Carlin and James Guthrie, 'Accrual Output Based Budgeting Systems in Australia: The Rhetoric – Reality Gap' (2003) 5 *Public Management Review* 145 at 154-158; Maurice Kennedy, *Cheques and Balances*, Parliamentary Library Research Paper No 16 (2002) pp 34-38.

[18] See Cheryl Saunders, 'Parliamentary Appropriations' in Cheryl Saunders, Michael Crommelin, M Byers, M Gray, D Dawson and R Jennings, *Current Constitutional Problems in Australia* (1982) p 13. See also *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 at 384 (Stephen J).

[19] Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Review of the Accrual Budget Documentation*, Report 388 (2002) p 8.

[20] See Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Review of the Accrual Budget Documentation*, Report 388 (2002); Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997*, Report 374 (2000); Finance and Public Administration Legislation Committee, Senate, *The Format of the Portfolio Budget Statements: Third Report* (2000) and the earlier reports in this series; Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Financial Reporting for the Commonwealth: Towards Greater Transparency and Accountability*, Report 341 (1995); Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Accrual Accounting: A Cultural Change*, Report 338 (1995).

[21] See *Financial Management and Accountability Act 1997* (Cth) ss 16 (instructions for 'special public money') and 63 (orders, except certain determinations), 65 (regulations); *Legislative Instruments Act 2003* (Cth) s 42. Notably, ss 63 (certain determinations according to orders) and 64 (guidelines) are exempted: *Legislative Instruments Act 2003* (Cth) s 44(2) (items 20, 21).

for financial statements,[23] guidelines on financial and governance standards,[24] drawing rights,[25] and so on. Under the *Commonwealth Authorities and Companies Act 1997* (Cth) these arrangements include the accounting standards for financial statements[26] and the form of annual reporting.[27] While these traditional approaches are undoubtedly useful, there are very few (if any) restrictions on the Parliament taking control and establishing its own standards and principles, and requiring the Australian Government to comply through its reporting standards and obligations. To some extent this already occurs, although its potential does not appear to have been considered in detail by the Parliament.[28] Examples of these kinds of existing Parliamentary controls include:

(a) The *Public Accounts and Audit Committee Act 1951* (Cth) provides for the JCPAA to examine and report on various financial activities of the Australian Government and to determine the audit priorities of the Parliament, albeit that the Auditor-General is not obliged follow these priorities;[29]

(b) The *Auditor-General Act 1997* (Cth) requires that the Auditor-General (an independent officer of the Parliament)[30] must have regard to audit priorities of the Parliament,[31] to conduct audits and 'performance audits' providing reports to the Parliament,[32] and set auditing standards;[33]

(c) The *Public Service Act 1999* (Cth) *Annual Reports* prepared according to guidelines approved by the JCPAA and linking the financial management (under the *Financial Management and Accountability Act 1997* (Cth)) and people management (under the *Public Service Act 1999* (Cth)) arrangements within an outcomes and outputs/program framework in the *Portfolio Budget Statements* (and *Portfolio Additional Estimates Statements*) that accompany the annual Appropriation Acts;[34] and

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[22] See *Financial Management and Accountability Act 1997* (Cth) s 63; *Financial Management and Accountability Orders 2008* (Cth).
[23] See *Financial Management and Accountability Act 1997* (Cth) s 63; amended *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2009) 2009* (Cth).
[24] See *Financial Management and Accountability Act 1997* (Cth) s 64. Relevant examples include Department of Finance and Administration, *Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort*, Financial Management Guidance No 6 (2003); Department of Finance and Administration, *Guidelines for the Management of Special Accounts*, Financial Management Guidance No 7 (2003); Department of Finance and Administration, *The Role of the CFO – Guidance for Commonwealth Agencies*, Financial Management Guidance No 11 (2003).
[25] See *Financial Management and Accountability Act 1997* (Cth) s 27.
[26] See *Commonwealth Authorities and Companies Act 1997* (Cth) s 48; amended *Commonwealth Authorities and Companies Orders (Financial Statements for reporting periods ending on or after 1 July 2009) 2009* (Cth) o 3, sch 1.
[27] See *Commonwealth Authorities and Companies Act 1997* (Cth) s 48; *Commonwealth Authorities and Companies (Report of Operations) Orders 2005* (Cth).
[28] See, for example, Standing Committee on Finance and Public Administration, Senate, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) pp 63-67 that appears to endorse only the existing arrangements such as encouraging further scrutiny by Senate committees, further assistance from the Auditor-General, further assistance to Senators by Senate committee staff, reasserting the approval process for appropriations, and so on.
[29] *Public Accounts and Audit Committee Act 1951* (Cth) s 8; *Auditor-General Act 1997* (Cth) s 10.
[30] *Auditor-General Act 1997* (Cth) s 8(1). See also Commonwealth, *Parliamentary Debates*, Senate, 5 March 1997, p 1350 (Ian Campbell, Parliamentary Secretary to the Treasurer); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8342 (John Fahey, Minister for Finance). Albeit there are some significant restriction that may be imposed on the Auditor-General by the Australian Government (Attorney-General): see Legal and Constitutional Legislation Committee, Senate, *Auditor-General Bill 1996: Clauses 35 and 37* (1997) pp 3-11.
[31] *Auditor-General Act 1997* (Cth) s 10; *Public Accounts and Audit Committee Act 1951* (Cth) s 8(1)(m).
[32] *Auditor-General Act 1997* (Cth) ss 11-13 ('audits'), 15-17 ('performance audits') and 18 ('general performance audits').
[33] *Auditor-General Act 1997* (Cth) s 24.
[34] *Public Service Act 1999* (Cth) ss 63(1) and (2). See also Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2010). See also Australian National Audit Office and Department of Finance and Administration, *Guide on Annual Performance Reporting*, Better Practice Guide (2004); Australian National Audit Office, *Annual Performance Reporting*, Audit Report No 11 2003-04 (2003); Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Better Practice Guide (2002).

(d) The *Charter of Budget Honesty Act 1998* (Cth) imposes reporting obligations including that the Treasurer make public a mid-year economic and fiscal outlook report by the end of January in each year, or within 6 months after the last budget, whichever is later,[35] a budget economic and fiscal outlook report with each budget,[36] and a final budget outcome report within 3 months of the end of each financial year.[37]

These measures illustrate that the Parliament can impose obligations on the Australian Government to comply with accountability, responsibility and transparency standards. However, this requires that modern governmental administration develop the new skills, processes and procedures to properly scrutinise the Australian Government's expenditures. In effect this requires the Parliament to re-invigorate is own oversight role. Whether the Parliament is up to this task is another matter!

Irrespective of the capacity and interest of Parliament, the Executive itself continues to evolve and reform. Like earlier governments, the current Australian Government also has an active program of reform that promised to incrementally improve the various frameworks, now generally characterised as 'the Public Management Framework':

> The framework is subject to continuous analysis and improvement ... given that the genesis of the financial management framework was in the early 1990's, it is appropriate to step back and assess the underlying foundations … The government will not be resorting to ad hoc responses. Nor will we be taking the path of increased red tape. This is a broader process and it will provide the context and the framework for the work being undertaken on program delivery. This stream of work will focus on:
>
> - improved accountability;
> - financial framework initiatives;
> - changes to the governance of Australian Government bodies and GBEs; and
> - improved public reporting.
>
> This reform project will provide a significant opportunity to deliver improvements … [that] will clarify responsibility and accountability; simplify processes; provide for wider engagement; and, more effectively utilise expertise across government. This will lead to operational efficiencies through clearer guidance and streamlined processes, including providing whole-of-government practices for agencies to utilise where appropriate.[38]

This continues to be an exciting and developing area with the prospect of even better accountability, transparency and responsibility. As with earlier reforms, each step will need to be assessed and the lessons of history deployed to improve the frameworks.

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[35] *Charter of Budget Honesty Act 1998* (Cth) s 14(1).
[36] *Charter of Budget Honesty Act 1998* (Cth) s 10.
[37] *Charter of Budget Honesty Act 1998* (Cth) s 18.
[38] Minister for Finance and Deregulation, *Commonwealth Authorities & Companies Discussion Forum 'Better Government'*, National Portrait Gallery, Canberra, 8 December 2010.

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This book goes beyond the traditional fare of administrative law (such as merits review, freedom of information, privacy, ombudsman, human rights, crime prevention, discrimination, and so on) and the new frontier of the evolving integrity arrangements (such as crime and misconduct commissions, whistleblower protections, aspects of the ombudsman's work, and so on) and addresses the 'other administrative law'. These are the means of accountability, responsibility and transparency centred on the Parliament and the political process worked out through the Parliament. In particular this covers the Budget, and the financial and employment frameworks adopted through the recent public administration reforms under the *Financial Management and Accountability Act 1997* (Cth), the *Commonwealth Authorities and Companies Act 1997* (Cth), the *Auditor-General Act 1997* (Cth), the *Charter of Budget Honesty Act 1998* (Cth), and the *Public Service Act 1999* (Cth). This 'other administrative law' has now evolved considerably into a sophisticated framework of principles and procedures. The book addresses this sophisticated framework and the interaction between its various parts founded on the authority of the *Constitution*.

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